(42)

No. 99-1257-CFX Title: Carol M. Browner, Administrator of Environmental Protection Agency, et al., Petitioners
v.
American Trucking Associations, Inc., et al.

Docketed:
January 27, 2000 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jan 27 2000	Petition for writ of certiorari filed. (Response due March 28, 2000)
	Jan 27 2000	Appendix of petitioner filed.
	Jan 27 2000	LODGING consisting of nine copies of Federal Register material submitted by the Solicitor General.
	Feb 14 2000	Order extending time to file response to petition until March 28, 2000.
	Feb 14 2000	This extension is granted for all respondents.
	Feb 16 2000	Brief of respondent American Lung Association in opposition filed.
	Feb 28 2000	Brief of respondents Appalachian Power Co., et al. in opposition filed. VIDED.
	Feb 28 2000	Brief of respondents American Trucking Associations, Inc., et al. in opposition filed. VIDED.
	Mar 14 2000	Brief amicus curiae of Mercatus Center at George Mason University filed. VIDED.
	Mar 21 2000	Brief of respondents Ohio, Michigan and West Virginia filed. VIDED.
	Mar 28 2000	Brief of respondents Massachusetts and New Jersey in support of petitions filed. VIDED.
	Mar 28 2000	Brief amici curiae of New York, et al. in support of petitions filed. VIDED.
	Mar 28 2000	Brief of respondents National Stone Association and Kennecott Holdings Corp. filed. VIDED.
	Mar 28 2000	Brief amicus curiae of Manufacturers Alliance/MAPI inc. filed. VIDED.
	Apr 12 2000	Reply brief of petitioners Carol Browner, Administrator of EPA, et al. filed.
	Apr 12 2000	Brief of American Lung Assn. in response to conditional cross-petitions filed.
	Apr 17 2000	Reply brief of petitioner Massachusetts and New Jersey in support of petitions filed. VIDED.
	Apr 25 2000	DISTRIBUTED for Conference of May 11, 2000
	May 15 2000	REDISTRIBUTED for Conference of May 18, 2000
	May 22 2000	Petition GRANTED. SET FOR ARGUMENT November 7, 2000. **********
	Jun 9 2000	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Jun 19 2000	Order adopting the Solicitor General's proposal for simultaneously briefing 99-1257 and 99-1426. Opening briefs for the petitioners in 99-1257 and 99-1426; opening briefs for respondents supporting those petitioners are due on or before July 21, 2000. Briefs for respondents opposing petitioners in 99-1257 and 99-

3 pp

Entry	Date	Proceedings and Orders
		1426 are due on or before September 11, 2000. Reply briefs are due on or before October 6, 2000. These briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m. on the due dates. Rule 29.2 does not apply.
	Jun 21 2000	Motion of Solicitor General to dispense with printing the joint appendix DISTRIBUTED (6/22/00).
	Jun 26 2000	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Jul 18 2000	LODGING consisting of one copy of EPA Regulatory Impact Analysis for the Particulate Matter and Ozone Natl. Ambient Air Quality Standards and Proposed Regional Haze Rule (July 16, 1997) submitted by counsel for American Trucking Associations, et al. VIDED.
	Jul 19 2000	Brief of respondents Massachusetts and New Jersey in support of petition filed.
	Jul 20 2000	Series of EPA publications re rulemaking sent by the Solicitor General and transmitted to the Court Library LODGED.
	Jul 20 2000	Brief of petitioners Carol Browner, Administrator of EPA, et al. filed.
	Jul 20 2000	Brief of respondent American Lung Association in support of petition filed.
	Jul 21 2000	Brief amici curiae of New York, et al. filed.
	Jul 21 2000	Brief amici curiae of Environmental Defense, et al. filed.
	Sep 8 2000	Brief amici curiae of Orrin Hatch and Tom Bliley filed.
	Sep 8 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Sep 11 2000	Brief of respondents American Trucking Assn., Chamber of Commerce of US, et al. filed.
	Sep 11 2000	Brief of respondents Ohio, Michigan and West Virginia filed.
	Sep 11 2000	Brief of respondents Appalachian Power Co., et al. filed.
	Sep 11 2000	Brief amici curiae of Manufacturers Alliance/MAPI Inc.,et al. filed.
	Sep 11 2000	Brief amici curiae of INTEL Corporation, et al. filed.
	Sep 11 2000	Brief amici curiae of American Crop Protection Association, et al. filed.
	Sep 11 2000	Brief amici curiae of Lincoln Institute for Research and Education, et al. filed.
	Sep 11 2000	Brief amici curiae of Association of American Physicians and Surgeons, et al. filed.
	Sep 11 2000	Brief amici curiae of Gary E. Marchant, et al. filed.
	Sep 11 2000	Brief amicus curiae of Mercatus Center at George Mason University filed.
	Sep 11 2000	Brief amicus curiae of General Electric Company filed.
	Sep 11 2000	Brief amicus curiae of Institute for Justice and Cato Institute filed.
	Sep 11 2000	Brief amici curiae of American Institute of Certified Public Accountants, et al. filed.
	Sep 11 2000	Brief amicus curiae of Virginia filed. VIDED.
	Sep 11 2000	Brief amicus curiae of Alcan Aluminum Corporation filed.
	Sep 11 2000	Brief amici curiae of People for the U.S.A. and Alliance for

No. 99-1257-CFX

Entry	Date	Proceedings and Orders
		America filed.
	Sep 15 2000	CIRCULATED.
	Sep 26 2000	Motion of respondents Ohio, et al. for divided argument filed.
	Oct 5 2000	Reply brief of petitioners Carol Browner, Administrator of the EPA, et al. filed.
	Oct 5 2000	Reply brief of respondents Massachusetts and New Jersey in support filed.
	Oct 5 2000	Reply brief of respondent American Lung Association filed.
	Oct 13 2000	Motion of Ohio, et al. for divided argument DISTRIBUTED.
	Oct 16 2000	Motion of respondents Ohio, et al. for divided argument GRANTED.
	Oct 20 2000	Record filed.
	Oct 25 2000	Record filed.
	Nov 7 2000	ARGUED.

Supreme Court, U.S.
FILED
991257 JAN 27 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

DAVID J. KAPLAN
MARY F. EDGAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel

ROBERT G. DREHER
Deputy General Counsel

GERALD K. GLEASON
MICHAEL L. GOO
AMEY W. MARRELLA
JAN M. TIERNEY
KEVIN W. MCLEAN
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

40 pp

QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

PARTIES TO THE PROCEEDING

1. Petitioners are the respondents in the court of appeals: Carol M. Browner, the Administrator of the Environmental Protection Agency, and the Environmental Protection Agency (EPA).

The following parties intervened in support of EPA in the court of appeals: the American Lung Association, the Commonwealth of Massachusetts and the State of New Jersey.

The following States appeared as amici curiae in support of EPA in the court of appeals: New York, Connecticut, New Hampshire and Vermont.

2. Respondents are the petitioners in the court of appeals:

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest and Paper Association
American Iron and Steel Institute
American Petroleum Association
American Portland Cement Alliance
American Public Power Association
American Trucking Associations, Inc.
Appalachian Power Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power & Light Company

Chamber of Commerce of the United States of America
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
The Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company

Madison Gas and Electric Company
David Matusow
Brian McCarthy
Meridian Gold Company
The State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
National Association of Manufacturers
National Association of Home Builders
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Stone Association
National Small Business United
Nevada Mining Association
Newmont Gold Company
Non-Ferrous Founders Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
The State of Ohio
Ohio Edison Company
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
PacifiCorp
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
The Potomac Edison Company
Potomac Electric Power Company

PP&L Resources
Public Service Company of New Mexico
Richard Romero
Salt River Project Agricultural Improvement & Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Tampa Electric Company
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
Virginia Power
Western Fuels Association
West Penn Power Company
The State of West Virginia
West Virginia Chamber of Commerce
Wisconsin Electric Power Company

The following parties intervened in support of petitioners American Trucking Ass'ns, et al., in the court of appeals:

American Road and Transportation Builders Association
Atlantic City Electric Company
Texas Gas Transmission Corporation

The following persons appeared as amici curiae in support of petitioners American Trucking Ass'ns, *et al.*, in the court of appeals:

Representative Tom Bliley
Senator Orrin G. Hatch

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	9
Conclusion	30

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)	12, 14
Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	24
American Airlines, Inc. v. *Herman*, 176 F.3d 283 (5th Cir. 1999)	23
American Lung Ass'n v. *EPA*, 134 F.3d 388 (D.C. Cir. 1998), cert. denied, 120 S. Ct. 58 (1999)	10
American Petroleum Inst. v. *Costle*, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982)	10
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	12, 13, 14, 17
Bennett v. *Spear*, 520 U.S. 154 (1997)	21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	16, 24, 25, 28, 29
Dow Chem. Co. v. *EPA*, 832 F.2d 319 (5th Cir. 1987)	22
FPC v. *Conway Corp.*, 426 U.S. 271 (1976)	12, 18
Hindes v. *FDIC*, 137 F.3d 148 (3d Cir. 1998)	23
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980)	10, 15
Lichter v. *United States*, 334 U.S. 742 (1948)	12
Mistretta v. *United States*, 488 U.S. 361 (1989)	13, 16
Mobil Exploration & Producing U.S., Inc. v. *Department of the Interior*, 180 F.3d 1192 (10th Cir. 1999)	23

Cases—Continued: Page

Montana-Dakota Util. Co. v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951) 18-19
NBC v. *United States*, 319 U.S. 190 (1943) 12
Natural Resources Defense Council, Inc. v. *EPA*, 902 F.2d 962 (1990), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991) 10, 19
Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 24, 25
Reno v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) 24
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 12, 13
South Terminal Corp. v. *EPA*, 504 F.2d 646 (1st Cir. 1974) 19
Touby v. *United States*, 500 U.S. 160 (1991) 12, 14
U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) 25
Vermont Yankee Nuclear Power Co. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 17
Western Ill. Home Health Care, Inc. v. *Herman*, 150 F.3d 659 (7th Cir. 1998) 23
Yakus v. *United States*, 321 U.S. 414 (1944) 12, 13

Constitution and statutes:

U.S. Const.:
Art. I 2
§ 8, Cl. 18 16
Art. III 24
Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399 4
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
§ 107, 42 U.S.C. 7407 ..... 26, 27
§ 107(d), 42 U.S.C. 7407(d) 20, 22, 24, 26, 27, 28
§ 107(d)(1), 42 U.S.C. 7407(d)(1) 4, 24
§ 107(d)(1)(C), 42 U.S.C. 7407(d)(1)(C) 28
§ 107(d)(4)(A), 7407(d)(4)(A) 28
§ 108, 42 U.S.C. 7408 4
§ 108(a)(1)(A)-(B), 42 U.S.C. 7408(a)(1)(A)-(B) 13

Statutes—Continued: Page

§ 108(a)(2), 42 U.S.C. 7408(a)(2) 3, 13
§ 108(a)(2)(A)-(B), 42 U.S.C. 7408(a)(2)(A)-(B) 13
§ 109, 42 U.S.C. 7409 ..... 2, 3, 4, 7, 9, 13, 16, 18, 19
§ 109(b), 42 U.S.C. 7409(b) 3
§ 109(b)(1), 42 U.S.C. 7409(b)(1) 3, 7, 13
§ 109(d), 42 U.S.C. 7409(d) 26
§ 109(d)(1), 42 U.S.C. 7409(d)(1) 4
§ 109(d)(2), 42 U.S.C. 7409(d)(2) 13
§ 109(d)(2)(B), 42 U.S.C. 7409(d)(2)(B) 11
§ 110, 42 U.S.C. 7410 ..... 4, 20
§ 172, 42 U.S.C. 7502 ..... 5, 7, 24, 25
§ 172(a), 42 U.S.C. 7502(a) 4, 20, 22, 26
§ 172(a)(1)(B), 42 U.S.C. 7502(a)(1)(B) 20
§ 172(a)(1)(C), 42 U.S.C. 7502(a)(1)(C) 26, 28
§ 172(a)(2), 42 U.S.C. 7502(a)(2) 29
§ 172(a)(2)(D), 42 U.S.C. 7502(a)(2)(D) 26, 28
§ 172(c), 42 U.S.C. 7502(c) 4
§ 181, 42 U.S.C. 7511 ..... 7, 8, 24, 25
§ 181(a), 42 U.S.C. 7511(a) 7, 21, 26, 28
§ 181(a)(1), 42 U.S.C. 7511(a)(1) 5, 20, 26, 29, 30
§ 181(a)(3), 42 U.S.C. 7511(a)(3) 20
§ 181(a)(5), 42 U.S.C. 7511(a)(5) 30
§§ 181-191, 42 U.S.C. 7511-7514 26
§§ 181-192, 42 U.S.C. 7511-7514a 5
§ 302(h), 42 U.S.C. 7602(h) 3
§ 307(b), 42 U.S.C. 7607(b) 2, 19, 29
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 20
§ 307(d), 42 U.S.C. 7607(d) 14
§ 307(d)(3), 42 U.S.C. 7607(d)(3) 14
§ 307(d)(6)(b), 42 U.S.C. 7607(d)(6)(b) 14
§ 307(d)(9), 42 U.S.C. 7607(d)(9) 14

Miscellaneous:

61 Fed. Reg. (1996):
p. 65,716 14
pp. 65,719-65,721 14
pp. 65,727-65,728 14

Miscellaneous—Continued:	Page
62 Fed. Reg. (1997):	
pp. 38,579-38,655	5
p. 38,652	3, 5
p. 38,653	3
p. 38,654	3
pp. 38,656-38,666	14
pp. 38,666-38,667	3
pp. 38,674-38,675	14
pp. 38,674-38,677	14
p. 38,856	5
pp. 38,859-38,878	6
pp. 38,884-38,885	8, 21, 27
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977)	15
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970)	15
1 Staff of the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974)	15

In the Supreme Court of the United States

No.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Carol M. Browner, Administrator of the Environmental Protection Agency, *et al.* (EPA), respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these two sets of identically-captioned consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 175 F.3d 1027. The opinion on petitions for rehearing and dissenting statements on denial of rehearing en banc (Pet. App. 70a-102a) are reported at 195 F.3d 4.

JURISDICTION

The decision of the court of appeals was entered on May 14, 1999. Petitions for rehearing were granted in part and denied in part on October 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 1 of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth in the Appendix at Pet. App. 105a-126a.

The EPA rules at issue in this case are set forth in the Appendix at Pet. App. 102a-104a.

STATEMENT

Respondents American Trucking Associations, Inc., *et al.* (ATA), petitioned under Section 307(b) of the Clean Air Act (CAA), 42 U.S.C. 7607(b), for review of two final EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone under Section 109 of the CAA, 42 U.S.C. 7409. On May 14, 1999, the court of appeals issued a single opinion for the two sets of consolidated cases. No. 97-1440 (particulate matter); No. 97-1441 (ozone). A divided panel found that Section 109 of the CAA, 42 U.S.C. 7409, as interpreted by EPA in setting the ozone and particulate matter NAAQS, effected an unconstitutional delegation of legislative authority. The court remanded both rules with instructions that EPA should articulate an "intelligible principle" for determining the degree of residual risk to public health permissible in setting revised NAAQS. Although EPA had taken no final agency action to implement the revised ozone NAAQS, the court also issued an opinion, later modified, on the scope of EPA's implementation authority.

1. The CAA directs EPA to promulgate NAAQS, which establish the maximum permissible levels, in the outside air, of a limited number of pervasive pollutants that have adverse effects on public health and welfare. CAA § 109, 42 U.S.C. 7409. Section 109 directs EPA to promulgate "primary" NAAQS to protect human health and "secondary" NAAQS to protect "public welfare." See CAA § 109(b), 42 U.S.C. 7409(b). See also CAA § 302(h), 42 U.S.C. 7602(h) (defining welfare interests). EPA has promulgated NAAQS for six pollutants: sulfur dioxide, carbon monoxide, nitrogen oxide, lead, ozone, and particulate matter (PM).[1]

The CAA directs EPA to establish NAAQS at specific levels. Primary NAAQS must be set at levels that, "in the judgment of the [EPA] Administrator, * * * and allowing an adequate margin of safety, are requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). Secondary NAAQS must be set at levels that, "in the judgment of the Administrator," are "requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). In making those judgments, EPA must develop and rely on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air." CAA § 108(a)(2), 42 U.S.C. 7408(a)(2). EPA must review the air quality criteria and NAAQS every

---

[1] PM embraces airborne particles of varying size and composition. See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,653 (1997). PM_{10} denotes inhalable particulate matter up to approximately 10 micrometers in diameter, while $PM_{2.5}$ denotes PM up to approximately 2.5 micrometers in diameter. See 62 Fed. Reg. at 38,654 n.1, 38,666-38,667.

five years and revise them as "appropriate" in accordance with Sections 108 and 109. 42 U.S.C. 7409(d)(1).

The CAA sets out an implementation process, resting on principles of federal-state cooperation, to ensure that the air throughout the Nation "attains" the NAAQS. Within three years of promulgating a new or revised NAAQS, EPA must "designate" prescribed areas of the country as either attainment areas or nonattainment areas for each NAAQS pollutant depending on whether the NAAQS has been met. CAA § 107(d)(1), 42 U.S.C. 7407(d)(1). Once EPA designates an area as nonattainment for a NAAQS, EPA must establish the date by which the nonattainment area must attain the NAAQS in question (the attainment date). See generally CAA § 172(a), 42 U.S.C. 7502(a). The States are generally responsible for determining what measures are necessary within their borders to achieve and maintain the NAAQS. The CAA allows each State to develop, for approval by EPA, a State Implementation Plan (SIP) that sets forth pollution control measures necessary, among other things, for nonattainment areas within the State to attain all NAAQS by the applicable attainment dates. See CAA §§ 110, 172(c), 42 U.S.C. 7410, 7502(c).

Congress has amended the CAA on several occasions, including an extensive revision in 1990. See Pub. L. No. 101-549, 104 Stat. 2399 (the 1990 Amendments). The 1990 Amendments recognized, among other things, that many areas of the country had failed to attain the existing NAAQS, including the primary ozone NAAQS, set in 1979, of 0.12 parts per million (ppm) averaged over one hour (the one-hour standard). The 1990 Amendments revised the CAA's implementation process in certain respects, creating a new procedure for classifying nonattainment areas based upon pertinent factors (such as the severity of the nonattainment problem) and revising the method for setting attainment

dates. See generally CAA § 172, 42 U.S.C. 7502. The 1990 Amendments also imposed specific implementation measures for areas designated nonattainment for various pollutants. See CAA §§ 181-192, 42 U.S.C. 7511-7514a In the case of ozone, the 1990 Amendments established mandatory classifications and attainment dates for the primary one-hour ozone standard. See CAA § 181(a)(1), 42 U.S.C. 7511(a)(1).

2. In July 1997, after extensive rulemaking proceedings, EPA issued revised NAAQS for particulate matter and ozone in light of new scientific knowledge about the adverse health effects of those pollutants. See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652 (1997); NAAQS for Ozone, 62 Fed. Reg. at 38,856.[2]

a. EPA found that the 1987 NAAQS for particulate matter, which employed the indicator PM_{10} to regulate all inhalable particles (see note 1, *supra*), were inadequate to protect public health. EPA based its finding on more than 60 epidemiological studies showing serious adverse health effects at particulate matter concentrations below the 1987 NAAQS. Those health effects included premature death, increased hospital admissions, and respiratory illnesses, particularly among the elderly, people with respiratory and cardiovascular diseases, asthmatics, and children. EPA found that the health effects observed at concentrations below the 1987 NAAQS were likely associated with "fine" particles ($PM_{2.5}$) and therefore revised the 1987 NAAQS to establish new $PM_{2.5}$ standards. EPA also revised the PM_{10} standards to continue to address other health effects from larger (coarse) particles. See 62 Fed. Reg. at 38-579-38,655.

---

[2] Copies of those Federal Register notices have been lodged with the Clerk of the Court.

b. Similarly, EPA found that the 1979 one-hour ozone NAAQS was inadequate to protect public health based on clinical studies and other evidence linking prolonged ozone exposures (from six to eight hours) to numerous adverse health effects, including decreases in lung function, coughs and chest pain, potential aggravation of asthma, lung inflammation, increased susceptibility to respiratory infection, increased doctor and emergency room visits and hospitalizations, and possible permanent lung damage from repeated exposures. Children and asthmatics are particularly at risk. EPA therefore promulgated a more stringent ozone NAAQS of 0.08 ppm, averaged over an eight-hour period (the eight-hour standard). See 62 Fed. Reg. at 38,859-38,878.

3. Numerous industry groups, a public interest group, and several States and individuals challenged the revised particulate matter and ozone NAAQS. The court of appeals rejected many of the challenges, but nevertheless remanded the revised NAAQS to EPA and instructed the agency to "develop a constitutional construction of the act." Pet. App. 4a, 5a. Relying on a theory that was not extensively briefed by the parties, the court found that EPA's interpretation of Section 109 of the CAA "effects an unconstitutional delegation of legislative power." *Id.* at 4a. The majority reasoned that, because there is no scientifically determinable "threshold" below which adverse health effects from ozone can be ruled out, and because there "likely" is no similar threshold for PM, EPA must provide a "determinate criterion for drawing lines" for any "non-zero" standard. *Id.* at 5a-6a. According to the majority, EPA's interpretation of the CAA leaves it "free to pick any point between zero and a hair below * * * London's Killer Fog," a notorious 1952 incident in which approximately 4000 deaths over four days were attributed to air pollution. *Id.* at 13a. Judge Tatel dissented from that portion of the opinion, emphasizing that the majority "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence" upholding numerous congressional enactments containing fewer guiding principles than Section 109. *Id.* at 59a.

In the ozone case, the court of appeals rejected the industry petitioners' argument that Congress's 1990 Amendments to the CAA, which established mandatory classifications and attainment dates for the primary one-hour ozone standard then in effect, see CAA § 181, 42 U.S.C. 7511, precluded EPA from revising the ozone NAAQS. Pet. App. 34a-37a. That ruling resolved the issue before the court. The court of appeals nevertheless went on to direct what EPA may and may not do when it proceeds—in the future—to implement the ozone NAAQS. The court ruled that EPA cannot set nonattainment classifications and attainment dates for the revised ozone NAAQS through Section 172 (42 U.S.C. 7502), but must instead employ the classifications and attainment dates set out in Section 181(a) (42 U.S.C. 7511(a)), and this precluded EPA from impleenting a more protective ozone NAAQS. Pet. App. 34a, 37a-44a.[3]

4. EPA and other parties filed petitions for rehearing and suggestions for rehearing en banc. The panel denied EPA's petition for rehearing on the nondelegation issue. Pet App. 72a. It expressly rejected EPA's view that the relevant provisions of the CAA,

---

[3] The court of appeals resolved some, but not all, of the other challenges to EPA's rules. See Pet. App. 4a-5a. The court concluded that "[t]he remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act (and, if appropriate, modify the disputed NAAQS in accordance with that construction)." *Id.* at 5a.

including Section 109(b)(1)'s direction that NAAQS must be based on air quality criteria and "set at levels requisite to protect the public health," 42 U.S.C. 7409(b)(1), set out intelligible principles that limit the agency's discretion. Pet. App. 72a-89a. Judge Tatel dissented. *Id.* at 89a.

In the ozone case, the panel granted rehearing in part, to modify its opinion regarding EPA's authority to implement the revised NAAQS. Pet. App. 71a-72a, 76a-82a. The panel rejected EPA's argument that, because EPA had yet to take final action implementing the revised NAAQS, the court lacked jurisdiction to consider which provision of the CAA would govern EPA's implementation, including the specification of classifications and attainment dates. *Id.* at 77a-79a. The court found that EPA's statements on that issue in the regulatory preamble accompanying the revised ozone NAAQS, made in response to industry comments challenging EPA's authority to *promulgate* that standard, see 62 Fed. Reg. at 38,884-38,885, constituted final agency action on the question of implementation that was ripe for judicial review. Pet. App. 77a-79a. On the merits, the panel modified its opinion to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with [Section 181]." *Id.* at 81a. Judge Tatel wrote separately because he disagreed with the panel's reasoning. *Id.* at 83a-89a. He found the statute ambiguous and would have deferred to EPA's interpretation. *Id.* at 84a. Judge Tatel nevertheless concurred in the judgment because, in his view, the modified decision allows EPA to implement the revised ozone NAAQS in a nonattainment area once the area has attained the one-hour standard in accordance with Section 181. *Id.* at 89a.

The court also denied EPA's suggestion for rehearing en banc, with five of the court's eleven active judges

(Chief Judge Edwards, and Judges Silberman, Rogers, Tatel, and Garland) voting in favor of rehearing en banc, and four (Judges Williams, Ginsburg, Sentelle, and Randolph) voting against it. Pet. App. 90a-92a. Judge Silberman and Judge Tatel each wrote a statement dissenting from the denial of rehearing en banc on the nondelegation issue. *Id.* at 92a-96a (Silberman, J., dissenting); *id.* at 97a-99a (Tatel, J., dissenting). Chief Judge Edwards and Judge Garland joined in Judge Tatel's statement. *Id.* at 97a.

REASONS FOR GRANTING THE PETITION

The court of appeals has rejected EPA's revision of the particulate matter and ozone NAAQS, ruling that Section 109 of the CAA as interpreted by EPA effects an unconstitutional delegation of legislative power. The court's decision presents an issue of immense practical importance to the health of the American public. In addition, the court's ruling raises issues of extraordinary governmental concern. First, the court's decision represents a radical departure from settled law respecting the nondelegation doctrine. The court's ruling conflicts with this Court's decisions upholding congressional enactments containing far broader grants of authority than that contained in Section 109 and, as a consequence, raises questions respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments. Second, the court's approach would unjustifiably expand the role of the courts in reviewing agency action. In this instance, the court has directed EPA to revisit and artificially narrow the discretion that EPA has

previously been entitled to exercise under Section 109 of the CAA.[4]

The court's decision respecting EPA's authority to implement a revised ozone NAAQS also warrants review. The court's ruling is not only important from a public health perspective, but also raises a core jurisdictional question of far-reaching significance. The court adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals. Furthermore, by asserting jurisdiction before the agency action is ripe for review, the court of appeals has deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS.

The court's premature review of EPA's implementation authority has also resulted in an erroneous resolution of the merits, which additionally warrants this Court's review. The court's mistaken interpretation would inappropriately force EPA to delay protecting the public from the very health consequences

[4] As Judge Tatel observed, "[t]he Act has been parsed by [the District of Columbia Circuit] no fewer than ten times in published opinions delineating EPA authority in the NAAQS-setting process." Pet. App. 59a. See, *e.g.*, *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389, 392 (D.C. Cir. 1998) (sulfur dioxide), cert. denied, 120 S. Ct. 58 (1999); *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 969 (1990) (particulate matter), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981) (ozone), cert. denied, 455 U.S. 1034 (1982); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1161 (D.C. Cir.) (lead), cert. denied, 449 U.S. 1042 (1980). The majority acknowledged that those decisions recognized EPA's broad discretion to make policy judgments in setting NAAQS, but summarily discounted their relevance on the ground that "none of those panels addressed the claim of undue delegation that we face here." Pet. App. 12a.

that warrant a NAAQS revision in the first place, until areas attain an air quality standard that EPA has concluded is inadequate to protect public health.

1. The court of appeals' rejection of EPA's revised NAAQS for particulate matter and ozone presents an important federal question with profound implications for the health of the American public and the effectiveness of the CAA. Because the NAAQS are the foundation of key CAA programs, the current uncertainty regarding the validity of the revised $PM_{2.5}$ and ozone NAAQS will disrupt federal and state programs to achieve and maintain air quality. Based on the latest scientific knowledge, EPA has determined that the preexisting PM and ozone standards are inadequate to protect public health. The Clean Air Scientific Advisory Committee (CASAC)—a body created by Congress to render independent scientific advice on NAAQS decisions, 42 U.S.C. 7409(d)(2)(B)—has concurred in EPA's scientific findings in that regard. The court of appeals' decision frustrates EPA's efforts to revise the PM and ozone NAAQS and thus unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels. See, *e.g.*, Pet. App. 56a (finding that evidence in the rulemaking record "amply justifies establishment of new fine particle standards").

a. The court of appeals' decision is a striking departure from this Court's nondelegation jurisprudence. Section 109's grant of authority is "far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." Pet. App. 97a (Tatel, J., dissenting from denial of rehearing en banc); see also *id.* at 93a (Silberman, J., dissenting from denial of rehearing en banc) (Section

109 does not "raise a serious constitutional problem").[5] The court has overlooked this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context. *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946).[6] The majority brushed aside the CAA's terms in two conclusory sentences, holding that the statute, as interpreted by EPA, is unconstitutional because it does not provide a "determinate criterion for drawing lines." Pet. App. 6a.[7]

This Court has repeatedly held that Congress does not violate the Constitution "merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991); see, *e.g.*, *Yakus*, 321

[5] *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218-219 (1989), cites pertinent examples: *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (recovery of "excessive profits" on military contracts); *American Power & Light Co.*, 329 U.S. at 104 (prevention of "unfair[] or inequitable[]" distribution of security holder voting power); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (setting of "fair and equitable" commodities prices); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944) (determination of "just and reasonable rate"); *NBC* v. *United States*, 319 U.S. 190, 225-226 (1943) (regulation of broadcast licensing in "the public interest").

[6] The threshold question in the Court's previous nondelegation cases, including *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), has been whether Congress has authorized the agency to exercise nondelegable legislative functions. *Id.* at 530 ("[W]e look to the statute to see whether Congress has overstepped these limitations * * * [or] has itself established the standards of legal obligation, thus performing its essential legislative function.").

[7] See Pet. App. 5a ("EPA appears to have articulated no 'intelligible principle' to channel its application of [public health factors]; nor is one apparent from the statute."); *id.* at 14a ("Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power * * *.").

U.S. at 425 (Congress may authorize agencies to engage in activities that "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework"). It is "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.*, 329 U.S. at 105); *Skinner*, 490 U.S. at 218-219.

Had the court fully considered the terms of the statute, its history, purpose, and context, the court would have found that Section 109 amply satisfies that test. Section 109(b)(1) of the Act requires that primary NAAQS be set at levels "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. 7409(b)(1). To warrant the setting of a NAAQS, a pollutant must "reasonably be anticipated to endanger public health or welfare" and be emitted from "numerous or diverse * * * sources." CAA § 108(a)(1)(A)-(B), 42 U.S.C. 7408(a)(1)(A)-(B). Each NAAQS must be based on "air quality criteria" that reflect "the latest scientific knowledge," 42 U.S.C. 7408(a)(2), including information on "variable factors" that "may alter the effects on public health," as well as interactions with other pollutants "to produce an adverse effect on public health or welfare." 42 U.S.C. 7408(a)(2)(A)-(B). Further, the CAA establishes and prescribes the composition of CASAC and requires EPA to develop the "criteria" with extensive CASAC review. CAA § 109(d)(2), 42 U.S.C. 7409(d)(2).[8]

[8] The CAA's directives plainly require a high degree of protection and cannot reasonably be construed, as the court claimed, to allow EPA such broad discretion as to authorize pollutant levels ranging from zero to "a hair below" the infamous London Killer

Moreover, Congress has prescribed rulemaking procedures through Section 307(d) of the CAA that ensure extensive public participation and the availability of arbitrary-and-capricious review for EPA's NAAQS decisions. See 42 U.S.C. 7607(d). EPA must discuss the data, methodology, and major legal and policy interpretations underlying proposed NAAQS and explain any significant departure from CASAC's advice, 42 U.S.C. 7607(d)(3); respond to significant comments, 42 U.S.C. 7607(d)(6)(b); and provide a reasoned explanation adequate to withstand judicial review. 42 U.S.C. 7607(d)(9). The availability of such review weighs strongly in favor of the constitutionality of Section 109's grant of agency authority. See *American Power & Light Co.*, 329 U.S. at 105 ("[p]rivate rights are protected by access to the courts to test the application of the policy in the light of the[] legislative declarations"); *Touby*, 500 U.S. at 170 (Marshall, J., concurring); see also *Schechter Poultry*, 295 U.S. at 532-533 (distinguishing cases upholding broad legislative authorizations because, *e.g.*, statutes provided notice and hearing procedures).

Fog episode. Pet. App. 11a. For example, EPA found, based on new evidence in the 1997 rulemaking, that the 1987 NAAQS for particulate matter were inadequate to protect public health. That finding effectively dictated that the upper bound for the Administrator's consideration for revised standards had to be at least as protective as the 1987 NAAQS, which were set far below "Killer Fog" levels. See, *e.g.*, 62 Fed. Reg. at 38,656-38,666, 38,674-38,675. EPA made a similar finding regarding the inadequacy of the existing ozone NAAQS. 61 Fed. Reg. 65,716, 65,719-65,721 (1996). In each instance, EPA established the lower limit based on an extensive examination of the best available scientific evidence of adverse health effects, see 62 Fed. Reg. at 38,674-38,677; 61 Fed. Reg. at 65,727-65,728, and the range of alternatives considered was far narrower than the range suggested by the court. See also Pet. App. 66a (Tatel, J., dissenting).

The CAA's legislative history, which the majority also failed to consider, provides further guidance to the agency. That history indicates that the health effects justifying a NAAQS must be "adverse," *Lead Indus. Ass'n*, 647 F.2d at 1152 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970)), and therefore must be medically significant and not merely detectable. To provide an "adequate margin of safety," standards must be "preventative or precautionary," reflecting an emphasis on the "predominant value of protection of public health." *Ibid.* (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 49 (1977)); *id.* at 1155 (EPA must "err on the side of caution"). EPA cannot consider the economic or technological feasibility of attaining NAAQS. *Id.* at 1148-1151. Finally, public health is distinct from individual health; NAAQS must protect "sensitive" populations, such as asthmatics, *id.* at 1152, but not the most sensitive individuals within those populations. See S. Rep. No. 1196, *supra*, at 10 (EPA must consider effects by reference to "a representative sample of persons comprising the sensitive group rather than to a single person in such a group."), *reprinted in* 1 Staff of the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 410 (Comm. Print 1974).[9]

---

[9] Drawing on the legislative guidance, EPA has developed "decisional criteria" that it considers in the course of developing NAAQS. The public health factors considered include the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk. The District of Columbia Circuit first approved EPA's use of those factors almost 20 years ago, *Lead Indus.*, 647 F.2d at 1161; EPA has since employed them in numerous NAAQS rulemakings; and even the panel majority found them reasonable. Pet. App. 5a-7a.

This Court's decisions on the nondelegation doctrine reflect "a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. The court of appeals lost sight of that crucial practical understanding and, in doing so, opened to potential constitutional attack not only Section 109 of the CAA, but also numerous other federal statutes containing similarly broad grants of authority to administrative agencies.

b. The court of appeals' decision departs from established law by transforming the nondelegation doctrine from a means for preserving the separation of powers by ensuring that Congress has not abdicated, by delegating to another Branch or to private parties, its power to "make * * * Laws," U.S. Const. Art. I, § 8, Cl. 18, into a basis for otherwise unwarranted judicial supervision of the exercise of administrative discretion. See Pet. App. 14a. The court directed EPA to "develop[] determinate, binding standards for itself" to reduce the likelihood that EPA would "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *Ibid.* Neither *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), nor any other decision of this Court, justifies that novel utilization of the nondelegation doctrine. See Pet. App. 92a (Silberman, J., dissenting from the denial of rehearing en banc) ("I do not think that [the nondelegation] doctrine can be employed to force an agency to narrow a broad legislative delegation from Congress.").

As a practical matter, the court of appeals' decision would initiate a fundamental change in the nature of

judicial review of agency standard-setting. The court concluded that the nondelegation doctrine requires Congress, or agencies interpreting the intent of Congress, to delineate a "determinate criterion for drawing lines" or, by implication, a quantitative rule for deciding the precise degree of protection required for a given health or safety standard. See Pet. App. 6a. In effect, the panel demanded that either the CAA or EPA supply a principle that would allow a reviewing court to conclude that EPA reached what is, in the court's view, exactly the "right" result. That approach would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard. As Judge Silberman recognized, it would "implicitly assert[] a greater role for a reviewing court than is justified." *Id.* at 96a. See also note 4 , *supra.*

The court's direction to EPA to develop "determinate, binding standards" to govern the agency's NAAQS decisions (Pet. App. 14a) is inconsistent with this Court's instruction in *American Power & Light Co.*, 329 U.S. at 106:

> Nor is there any constitutional requirement that the legislative standards be translated by [an agency] into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

Cf. *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-545 (1978). The court's rationale for its approach—to make arbitrary agency action less likely and to enhance meaningful judicial review (Pet. App. 14a)—is adequately addressed through the arbitrary and capricious standard for judicial review of agency action, including review to determine whether the agency has ade-

quately explained any departures from past practices or decisions. See *id.* at 68a (Tatel, J., dissenting) (those issues "relate to whether the NAAQS are arbitrary and capricious" and "ha[ve] nothing to do with our inquiry under the nondelegation doctrine").[10]

Neither the Constitution, the CAA, nor any prior judicial decision requires EPA to supply the "determinate criterion for drawing lines," Pet. App. 6a, that would produce the precision the majority demanded here. See also *id.* at 10a (standard prescribing "how much uncertainty is too much"). Instead, EPA must consider the factors that the CAA prescribes and provide a reasoned explanation, based on scientific evidence, for its decision. As this Court explained in reviewing rates set by the Federal Power Commission under a statute requiring rates to be "just and reasonable":

> [T]here is no single cost-recovering rate, but a zone of reasonableness: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high."

FPC v. *Conway Corp.*, 426 U.S. 271, 278 (1976) (quoting *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)). That is also the approach the District of Columbia Circuit has followed in reviewing prior decisions under Section 109, such as the 1987 particulate matter standard. See *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 972 (D.C. Cir. 1990) (CAA does not require EPA to identify "the clear and sole appropriate standard," but rather a standard that is reasonable in light of the record evidence).

[10] The court's extraordinary, policy-based suggestion that EPA could employ a quantitative "generic unit of harm" based on Oregon's approach to Medicaid (Pet. App. 16a-17a & n.5) would not solve the constitutional problem the court perceived; EPA would still have to draw lines. Even if we assume that such a quantitative approach were possible, the policy judgments necessary to establish a "generic unit of harm" and to determine how many such units are permissible under the CAA would be similar to those EPA has traditionally made in its NAAQS proceedings; these judgments would merely be made under a different framework that would likely be more confusing and difficult for the public and a reviewing court to evaluate.

The court of appeals' decision marks a profound change in the ground rules that shape not only EPA's air quality and other programs, but also those of other federal agencies. Many, if not most, of the rules and decisions under those programs are reviewed in the District of Columbia Circuit. This Court should review the court of appeals' decision and determine, before EPA and other agencies refocus the analyses that they have traditionally employed under the arbitrary and capricious standard, whether those new ground rules are appropriate.[11]

2. The court of appeals also significantly erred in assuming jurisdiction to decide the scope of EPA's

[11] The court of appeals' decision cannot give rise to a square conflict among the courts of appeals, because Section 307(b) of the CAA vests the District of Columbia Circuit with exclusive jurisdiction to review EPA's decisions to promulgate and revise the NAAQS. See 42 U.S.C. 7607(b). Nevertheless, as Judge Tatel noted, the majority's decision is inconsistent with the reasoning of a First Circuit decision that addressed a nondelegation challenge in the course of reviewing a CAA implementation issue (a transportation plan aimed at achieving a NAAQS). See Pet. App. 60a-61a. See also pp. 19-20, *infra* (describing the CAA provisions that direct implementation challenges to the regional courts of appeals). The First Circuit stated, in that context, that Section 109's "requisite to protect the public health" standard is not an unconstitutional and excessive delegation of legislative authority. *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 677 (1974).

authority to implement and enforce the revised ozone NAAQS. Pet. App. 37a-44a. Section 307(b)(1) of the CAA authorizes the District of Columbia Circuit to review "action of the Administrator in promulgating any [NAAQS]" and other "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. 7607(b)(1). Section 307(b)(1) further states, however, that the regional courts of appeals shall have authority to review "the Administrator's action in approving or promulgating any implementation plan under [Section 110 of the Act]." 42 U.S.C. 7607(b)(1). The CAA makes clear, by expressly deferring challenges to EPA's classification decisions until EPA takes final action on a State's submission (or failure to submit) a SIP, that the question of how to classify areas for purposes of setting attainment dates for the revised ozone NAAQS is reviewable only as part of the post-NAAQS-promulgation process of implementation planning. See CAA §§ 172(a)(1)(B), 181(a)(3), 42 U.S.C. 7502(a)(1)(B), 7511(a)(3).

Consistent with the procedural steps set out in the CAA, EPA did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS. EPA has not, for example, designated areas as attainment or nonattainment for the eight-hour standard under Section 107(d), and it has neither classified any nonattainment areas nor established attainment dates under either Section 172(a) or Section 181(a)(1). See 42 U.S.C. 7502(a), 7511(a)(1). The issue of implementation arose solely because ATA argued that Congress, by establishing a scheme in Section 181(a)(1) for implementing the then-current one-hour ozone standard, implicitly prohibited EPA from ever promulgating any revised ozone NAAQS. EPA responded to that argument in the rulemaking preamble (and later in its court of appeals brief) by explaining, in

the course of showing why the Section 181(a) scheme does not prevent EPA from promulgating a revised NAAQS, how it would implement such a standard. See 62 Fed. Reg. at 38,884-38,885. The only issue before the court of appeals, therefore, was whether the statutory provisions at issue precluded EPA from promulgating the revised standard. Once the court answered this question in the negative, Pet. App. 34a-37a, its task was done. It should not have gone on to consider prematurely whether and how EPA could implement the revised NAAQS.

The court of appeals' decision to address prematurely the question of NAAQS implementation has important consequences that warrant this Court's review. The court of appeals has departed from the requirement that the reviewing court restrict its inquiry to the agency's final actions, and it has adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals. The court has also violated similarly well-established ripeness principles and deprived the agency charged with implementing a complex statute of the opportunity fully to develop its interpretation and resolve any tensions within the statutory scheme.

a. The panel erroneously concluded that the views that EPA had expressed in the rulemaking preamble regarding its implementation authority constitute final action. Pet. App. 77a-78a. In *Bennett* v. *Spear*, 520 U.S. 154 (1997), this Court explained that

> two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process * * *—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been

> determined," or from which "legal consequences will flow" * * *.

Id. at 177-178 (citations omitted). In this case, the court of appeals determined, notwithstanding *Bennett*, that preamble statements that merely express EPA's future intentions are final agency actions. The court effectively reconfigured each prong of this Court's test in a way that would significantly broaden the domain of final agency actions.

The court of appeals ruled that EPA's statements respecting NAAQS implementation satisfied the "consummation" prong because the court concluded that EPA's description of how it would implement the rule would likely not change. See Pet. App. 77a-78a. Under *Bennett*, however, the proper inquiry is not merely whether the agency has any present intention to alter its position. Rather, the question is whether the agency has completed its decisionmaking process under the governing statute for the specific agency action at issue. Here, EPA has not designated nonattainment areas, classified those areas, or set attainment dates in accordance with the CAA's statutorily prescribed decisionmaking process. See, *e.g.*, CAA §§ 107(d), 172(a), 42 U.S.C. 7407(d), 7502(a). The court of appeals' approach of focusing on the certainty of EPA's preamble statements, without considering whether the statements consummate the statutory decisionmaking process for implementing the ozone NAAQS, distorts the *Bennett* test and conflicts with the finality jurisprudence of other courts of appeals.[12]

[12] For example, in *Dow Chemical Co.* v. *EPA*, 832 F.2d 319 (5th Cir. 1987), the court explained that "EPA's construction of [the regulatory provision] is 'final' only in the sense that no one at the agency currently plans to revise it. The same could be said of countless other instances of legal 'interpretation.'" *Id.* at 323-324.

The court of appeals' decision also distorts the second *Bennett* factor. The court concluded that EPA's preamble statements respecting the agency's future implementation plans constitute final agency action even though no legal consequences flow from EPA's expression of its views regarding the statutory provisions that govern implementation of a revised ozone NAAQS. See Pet. App. 78a. ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates. ATA will be able to obtain judicial review of EPA's judgments on those issues—through the statutorily prescribed mechanism (see pp. 19-20, *supra*)—once EPA takes such final binding action on those specific matters. The court of appeals erred in overlooking these decisive considerations and treating the legal effects of NAAQS

Instead, to satisfy the definitiveness requirement, the relevant administrative decisional process must be complete. *American Airlines, Inc.* v. *Herman*, 176 F.3d 283, 291-292 (5th Cir. 1999). Other courts of appeals have taken varying approaches to whether certainty alone, or an evaluation within the broader statutory context, is necessary to determine whether the first factor under *Bennett* has been satisfied. Compare, *e.g.*, *Hindes* v. *FDIC*, 137 F.3d 148, 162 (3d Cir. 1998) (because notification issued by FDIC was the first step of a multi-step process, it did not constitute FDIC's definitive statement and thus was not final), and *Mobil Exploration & Producing U.S., Inc.* v. *Department of the Interior*, 180 F.3d 1192, 1198-1199 (10th Cir. 1999) (although agency letter may have concluded that an audit should begin under the statute, that did not consummate the decisionmaking process within the overall statutory scheme that would satisfy the first prong for finality), with *Western Ill. Home Health Care, Inc.* v. *Herman*, 150 F.3d 659, 663 (7th Cir. 1998) (agency letter characterizing situation as a joint employee relationship, establishing the agency's "enforcement position," satisfies the first prong of finality because it is "not at all tentative").

promulgation as if they were a consequence of EPA's preamble statements respecting implementation.[13]

b. Even if it is assumed that EPA's preamble statements respecting implementation constitute final agency action, that action would not be ripe for judicial review. The court of appeals' concern over how to reconcile Sections 172 and 181 is not yet fit for review because the matter is too abstract and general: EPA has neither fully developed its interpretation nor attempted to exercise its implementation authority. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-738 (1998); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967).[14]

The interplay among Section 107(d), Section 172, Section 181, and other relevant provisions of the CAA is complex. Judicial exploration of these issues would be on much surer footing if the reviewing court had the benefit of EPA's full thinking and explanation of how and why it has implemented a NAAQS in a particular way, in a particular context, after the completion of the relevant decisional process (including public notice and comment) that actually implements the standard. Furthermore, deferring review would allow EPA the opportunity to work through the various implementation provisions, reconcile any conflicts, and make any policy judgments and apply its expertise as necessary to resolve ambiguities in the statute. See *Ohio Forestry Ass'n*, 523 U.S. at 733-734; *Chevron*, 467 U.S. at 842-845. The importance of such a concrete setting for judicial review is underscored by the court's own confusion regarding EPA's interpretation, compare Pet. App. 43a, 44a, with *id.* at 80a-81a, and the extreme breadth and generality of the court's conclusion that "EPA can enforce a revised primary ozone NAAQS only in conformity with [Section 181]." *Id.* at 81a.[15]

3. In our view, the jurisdictional preconditions of final agency action and ripeness should have prevented the court of appeals from reaching the merits of any NAAQS implementation dispute. But even if the court of appeals could have overcome those obstacles, its decision on the merits is wrong. Congress "has not directly addressed the precise question" of the relationship between Section 172 and Section 181 (see *Chevron*, 467 U.S. at 843); instead, it has left a gap for the agency to fill (*id.* at 843-844); and the question is whether EPA's conclusion that Section 172 and Section 181 can be applied simultaneously "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (*id.* at 845). We first describe the origins of the relevant provisions, including the terminology of "Subpart 1" and "Subpart

---

[13] The court suggested that EPA's statements were final action because by "promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states * * * [and] those areas that do not comply will ultimately be required to do so." Pet. App. 78a. But the triggered events are solely a consequence of promulgation of the revised NAAQS and have nothing to do with EPA's preamble statements respecting implementation.

[14] Indeed, it is doubtful whether the dispute over implementation is sufficiently concrete to constitute a case or controversy within the meaning of Article III. See *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (the ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

[15] The court, on rehearing, erroneously concluded that this issue "would not benefit from a more concrete setting," apparently because the issue is legal in nature. See Pet. App. 80a. The presence of a legal issue does not, by itself, render review appropriate before the issue arises in a concrete case or controversy. See, *e.g.*, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994).

2." We then explain the difference between EPA's and the court's understanding of those provisions. Finally, we briefly summarize why, if the issue must be decided at this juncture, the court of appeals' understanding is flawed.

a. When Congress first enacted the CAA in 1970, and authorized EPA to promulgate and revise NAAQS, it expected that the various regions of the country would meet the NAAQS in a relatively short period of time. Attainment proved more difficult than expected, and when Congress enacted the 1990 CAA Amendments, it specifically addressed certain aspects of the nonattainment problem. First, Congress preserved (with some modifications) EPA's general authority to revise NAAQS at five-year intervals and to designate nonattainment areas. See CAA §§ 107(d), 109(d), 42 U.S.C. 7407(d), 7409(d). Next, Congress enacted a new Subpart 1, Part D, Title I of the CAA, which granted EPA additional authority, set out in Section 172(a), to classify nonattainment areas and to set attainment dates under all new or revised NAAQS. 42 U.S.C. 7502(a). Section 172(a) makes clear that this authority applies unless "classifications [or attainment dates] are specifically provided under other provisions" of the Act. 42 U.S.C. 7502(a)(1)(C) and (2)(D). In addition, Congress enacted a series of other new Subparts, encompassing Sections 181 to 191 of the CAA, to address the problems raised by nonattainment of particular NAAQS. Subpart 2 addresses the ozone NAAQS. Section 181(a)(1) therein sets out a schedule establishing "classification and attainment dates for 1989 nonattainment areas." 42 U.S.C. 7511(a). That schedule establishes those classifications and attainment dates based on the one-hour ozone standard then in effect and sets attainment dates that run from the enactment of the 1990 Amendments.

b. In response to public comments, EPA described the relationship between Section 107, Subpart 1, and Subpart 2. It stated in the ozone rulemaking that, once EPA completes promulgation of a revised ozone NAAQS, those provisions collectively require that EPA: (1) designate nonattainment areas in accordance with Section 107(d), and establish classifications and attainment dates and take other implementing actions for the revised ozone NAAQS under Subpart 1; and (2) simultaneously continue to implement the provisions of Subpart 2 for areas that have not yet attained under the prior one-hour ozone standard. See 62 Fed. Reg. at 38,884-38,885. The court of appeals properly rejected ATA's argument that EPA lacked *any* authority to revise the ozone NAAQS in light of the Subpart 2 classifications and attainment dates. Pet. App. 34a-37a. But the court went on to conclude (prematurely, in our view, see pp. 21-25, *supra*) that Subpart 2 precluded implementation of a more protective ozone NAAQS. See *id.* at 37a-44a. When EPA explained on rehearing that the court's construction would lead to irrational results, the court revised its decision to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," *id.* at 82a, which apparently means that EPA can enforce its revised ozone NAAQS under Subpart 1 once an area attains the one-hour standard under Subpart 2, *id.* at 89a (Tatel, J., concurring). See p. 8, *supra*.

c. The court of appeals' reasoning, even as modified on rehearing and interpreted by Judge Tatel, is flawed. Contrary to the court's suggestions, Pet. App. 37a, the CAA does not precisely address how to reconcile Subpart 1—which authorizes EPA to set new classifications and attainment dates for revised NAAQS—with Subpart 2—which establishes a specific timetable for compliance with the one-hour ozone standard in effect in

1989. The CAA surely does not dictate the result the court of appeals has required.[16]

Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the

[16] The court believed that the CAA specifies how those provisions should be reconciled because Subpart 1 provisions do not apply if "classifications [or attainment dates] are specifically provided under other provisions" of the CAA, see CAA § 172(a)(1)(C) and (2)(D), 42 U.S.C. 7502(a)(1)(C) and (2)(D). Pet. App. 37a. In the court's view, Subpart 2 provides classifications and attainment dates for *any* ozone standard, including any revised ozone NAAQS. That view, which is based on a highly technical argument, is wrong. The court reasoned that, because Section 181(a) of Subpart 2 states that an "area designated non-attainment for ozone pursuant to [Section 107(d)] * * * shall be classified at the time of such designation" in accordance with the table in Section 181(a); and because Section 107(d) addresses designations under both the one-hour ozone standard in effect in 1989 and future NAAQS revisions; then Subpart 2 must govern the implementation of any ozone NAAQS. See *id.* at 38a-41a. That reasoning is flawed because Section 181(a)'s reference to Section 107(d) is cabined by the context of Subpart 2. It is clear from the statutory context that Section 181(a) refers only to Section 107(d) designations of nonattainment areas under the one-hour ozone standard that was in effect in 1989. For example: (1) Section 181(a)'s caption denotes that the Section addresses "Classification and attainment dates *for 1989 nonattainment areas*" (emphasis added); (2) Section 181(a) bases attainment dates and classification on an area's "design value," specifically codifying the methodology of the one-hour ozone standard then in existence; (3) Section 181(a) provides classification and attainment dates only for nonattainment areas with ozone levels in excess of .012 ppm – the "design value" in effect in 1989-1990 under the one-hour standard; and (4) Section 181(a) bases attainment dates by reference to 1990 and imposes attainment deadlines that, for most areas, have already passed. See 42 U.S.C. 7511(a)(1). Hence, the text and context of Section 181(a) indicate that Congress intended to provide classifications and attainment dates only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard. See 42 U.S.C. 7407(d)(1)(C) and (4)(A).

court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. EPA has reasonably concluded that Congress intended that EPA would implement a revised ozone NAAQS under Subpart 1 for all members of the American public, including those members that reside in nonattainment areas governed by Subpart 2, "as expeditiously as practicable." See CAA § 172(a)(2), 42 U.S.C. 7502(a)(2); CAA § 181(a)(1), 42 U.S.C. 7511(a)(1). There is no warrant for imposing a categorical requirement that EPA must ensure compliance with the inadequately protective one-hour ozone standard before it can require efforts to attain the more protective revised ozone NAAQS.[17] To the extent that there is a conflict between Subpart 1 and Subpart 2, it is up to EPA to harmonize the applicable provisions, and the courts must defer to EPA's reasonable judgment on the matter. *Chevron*, 467 U.S. at 845.[18]

[17] For example, it may be "practicable"—and preferable from an implementing State's perspective—to achieve both the one-hour ozone standard and the revised ozone NAAQS at the same time. There is no reason to believe that Congress intended to preclude that approach.

[18] The court of appeals expressed concern that a practical conflict could conceivably arise for the Los Angeles nonattainment area between Subpart 1's attainment date for the revised ozone NAAQS and Subpart 2's attainment date for the one-hour ozone standard. In the court's view, Congress would not have intended that Los Angeles comply with the revised ozone NAAQS before Subpart 2's statutory deadline for compliance with the one-hour standard. See Pet. App. 41a. That concern, however, is overstated. The time deadlines set out in Section 181(a)(1) establish the outer time limits for attaining the one-hour standard, see 42 U.S.C. 7511(a)(1). Los Angeles would be required to attain the revised NAAQS under Subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard. Compare CAA § 172(a)(2), 42 U.S.C. 7502(a)(2), with

In our view, EPA's preliminary statements respecting implementation do not constitute final agency action and are not ripe for judicial review. But if the Court concludes otherwise, then it should proceed to address the merits of this important issue. On the merits, the court of appeals erred in ruling that the CAA categorically precludes the EPA from implementing the revised ozone NAAQS under Subpart 1 until the nonattainment areas described in Subpart 2 have attained Subpart 2's one-hour ozone standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

GARY S. GUZY
General Counsel

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT G. DREHER
Deputy General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

GERALD K. GLEASON
MICHAEL L. GOO
AMEY W. MARRELLA
JAN M. TIERNEY
KEVIN W. MCLEAN
Attorneys
Environmental Protection Agency

JEFFREY P. MINEAR
Assistant to the Solicitor General

DAVID J. KAPLAN
MARY F. EDGAR
Attorneys

JANUARY 2000

CAA § 181(a)(1) and (5), 42 U.S.C. 7511(a)(1) and (5). In any event, the question of how EPA should reconcile any competing compliance deadlines is clearly the type of issue that should first be addressed by EPA through the implementation process, including public notice and comment, and subject to judicial review in the appropriate regional court of appeals. See CAA § 307(b), 42 U.S.C. 7607(b).

Supreme Court, U.S.
FILED
991257 JAN 27 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
DAVID J. KAPLAN
MARY F. EDGAR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel
ROBERT G. DREHER
Deputy General Counsel
GERALD K. GLEASON
MICHAEL L. GOO
AMEY W. MARRELLA
JAN M. TIERNEY
KEVIN W. MCLEAN
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

128PP

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion, dated May 14, 1999)	1a
Appendix B:	
(court of appeals' opinion on rehearing, dated October 29, 1999)	70a
(court of appeals' dissenting statements on rehearing en banc, dated October 29, 1999)	90a
Appendix C (regulatory provisions, 40 C.F.R. 50.7)	102a
Appendix D (regulatory provisions, 40 C.F.R. 50.10)	104a
Appendix E (statutory provisions, 42 U.S.C. 7407, 7408, 7409, 7502, 7511, 7607)	105a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1546, 97-1548, 97-1551, 97-1552, 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582, 97-1585, 97-1586, 97-1587, 97-1588, 97-1592,
97-1594, 97-1596, 97-1597, 97-1598

97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Consolidated with
Nos. 97-1502, 97-1505, 97-1508, 97-1509, 97-1510,
97-1512, 97-1513, 97-1514, 97-1518, 97-1519, 97-1526,
97-1531, 97-1539, 97-1566, 97-1568, 97-1570, 97-1572,
97-1575, 97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Decided May 14, 1999]
[Argued December 17, 1998]

On Petitions for Review of an Order of the Environmental Protection Agency

BEFORE: WILLIAMS, GINSBURG and TATEL, *Circuit Judges.*

Opinion for the Court filed PER CURIAM.*

Separate opinion dissenting from Part I filed by *Circuit Judge* Tatel.

PER CURIAM:

Introduction

The Clean Air Act requires EPA to promulgate and periodically revise national ambient air quality standards ("NAAQS") for each air pollutant identified by the agency as meeting certain statutory criteria. See Clean Air Act §§ 108-09, 42 U.S.C. §§ 7408-09. For each pollutant, EPA sets a "primary standard"—a concentration level "requisite to protect the public health" with an "adequate margin of safety"—and a "secondary standard"—a level "requisite to protect the public welfare." *Id.* § 7409(b).

In July 1997 EPA issued final rules revising the primary and secondary NAAQS for particulate matter ("PM") and ozone. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) ("PM Final Rule"); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) ("Ozone Final Rule"). Numerous petitions for review have been filed for each rule.

---

* Judge Williams wrote Parts I and III.B; Judge Ginsburg wrote Parts II, III.A, and IV.D; Judge Tatel wrote Parts IV.A-C.

In Part I we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power. See U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States."). We remand the cases for EPA to develop a construction of the act that satisfies this constitutional requirement.

In Part II we reject the following claims: that § 109(d) of the Act allows EPA to consider costs; that EPA should have considered the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act ("NEPA"), Unfunded Mandates Reform Act ("UMRA"), and Regulatory Flexibility Act ("RFA").

In Part III we decide two ozone-specific statutory issues, holding that the 1990 revisions to the Clean Air Act limit EPA's ability to enforce new ozone NAAQS and that EPA cannot ignore the possible health benefits of ozone.

Finally, in Part IV we resolve various challenges to the PM NAAQS. We agree with petitioners that EPA's choice of PM_{10} as the indicator for coarse particulate matter was arbitrary and capricious; we reject petitioners' claims that EPA must treat $PM_{2.5}$ as a "new pollutant," that EPA must identify a biological mechanism explaining PM's harmful effects, and that the Clean Air Act requires secondary NAAQS to be set at levels that eliminate all adverse visibility effects.

The remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act (and, if appropriate, modify the disputed NAAQS in accordance with that construction).

I. *Delegation*

Certain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, i.e., ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero. See Ozone Final Rule, 62 Fed. Reg. at 38,863/3 ("Nor does it seem possible, in the Administrator's judgment, to identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects are likely to occur."); National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg. 65,637,

65,651/3 (1996) (proposed rule) ("[T]he single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur."). For convenience, we refer to both as non-threshold pollutants; the indeterminacy of PM's status does not affect EPA's analysis, or ours.

Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero. Section 109(b)(1) says that EPA must set each standard at the level "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). These are also the criteria by which EPA must determine whether a revision to existing NAAQS is appropriate. See 42 U.S.C. § 7409(d)(1) (EPA shall "promulgate such new standards as may be appropriate in accordance with . . . [§ 7409(b)]"); see also *infra* Part II.A. For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

We begin with the criteria EPA has announced for assessing health effects in setting the NAAQS for non-threshold pollutants.[1] They are "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." Ozone Final Rule, 62 Fed. Reg. at 38,883/2; EPA, "Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper," at II-2 (July 1996) ("PM Staff Paper") (listing same factors). Although these criteria, so stated, are a bit vague, they do focus the inquiry on pollution's effects on public health. And most of the vagueness in the abstract formulation melts away as EPA applies the criteria: EPA basically considers severity of effect, certainty of effect, and size of population affected. These criteria, long ago approved by the judiciary, see *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1161 (D.C. Cir. 1980) ("*Lead Industries*"), do not themselves speak to the issue of degree.

Read in light of these factors, EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

[1] Technically, EPA describes the criteria as used only for setting the "adequate margin of safety." There might be thought to be a separate step in which EPA determines what standard would protect public health *without* any margin of safety, and that step might be governed by different criteria. But EPA did not use such a process, and it need not. See *NRDC v. EPA*, 902 F.2d 963, 973 (D.C. Cir. 1990). Thus, the criteria mentioned in the text govern the whole standard-setting process.

Consider EPA's defense of the 0.08 ppm level of the ozone NAAQS. EPA explains that its choice is superior to retaining the existing level, 0.09 ppm, because more people are exposed to more serious effects at 0.09 than at 0.08. See Ozone Final Rule, 62 Fed. Reg. at 38,868/1. In defending the decision not to go down to 0.07, EPA never contradicts the intuitive proposition, confirmed by data in its Staff Paper, that reducing the standard to that level would bring about comparable changes. See EPA, "Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information: OAQPS Staff Paper," at 156 (June 1996) ("Ozone Staff Paper"). Instead, it gives three other reasons. The principal substantive one is based on the criteria just discussed:

> The most certain O_3-related effects, while judged to be adverse, are transient and reversible (particularly at O_3 exposures below 0.08 ppm), and the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects.

Ozone Final Rule, 62 Fed. Reg. at 38,868/2.

In other words, effects are less certain and less severe at lower levels of exposure. This seems to be nothing more than a statement that lower exposure levels are associated with lower risk to public health. The dissent argues that in setting the standard at 0.08, EPA relied on evidence that health effects occurring below that level are "transient and reversible," Dissent at 5, evidently assuming that those at higher levels are

not. But the EPA language quoted above does not make the categorical distinction the dissent says it does, and it is far from apparent that any health effects existing above the level are permanent or irreversible.

In addition to the assertion quoted above, EPA cited the consensus of the Clean Air Scientific Advisory Committee ("CASAC") that the standard should not be set below 0.08. That body gave no specific reasons for its recommendations, so the appeal to its authority, also made in defense of other standards in the PM Final Rule, see PM Final Rule, 62 Fed. Reg. at 38,677/2 (daily fine PM standard); *id.* at 38,678/3 (annual coarse PM standard); *id.* at 38,679/1 (daily coarse PM standard), adds no enlightenment. The dissent stresses the undisputed eminence of CASAC's members, Dissent at 4, but the question whether EPA acted pursuant to lawfully delegated authority is not a scientific one. Nothing in what CASAC says helps us discern an intelligible principle derived by EPA from the Clean Air Act.

Finally, EPA argued that a 0.07 standard would be "closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources." Ozone Final Rule, 62 Fed. Reg. at 38,868/3. But a 0.08 level, of course, is also *closer* to these peak levels than 0.09. The dissent notes that a single background observation fell between 0.07 and 0.08, and says that EPA's decision "ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not uncontrollable natural levels of ozone." Dissent at 6. EPA's language, coupled with the data on background ozone levels, may add up to a backhanded way of saying

that, given the national character of the NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively *extracting* chemicals from nature. That may well be a sound reading of the statute, but EPA has not explicitly adopted it.

EPA frequently defends a decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard. See Ozone Final Rule, 62 Fed. Reg. at 38,868/2; PM Final Rule, 62 Fed. Reg. at 38,676/3 (annual fine PM standard); *id.* at 38,677/2 (daily fine PM standard). And such an argument is likely implicit in its defense of the coarse PM standards. See PM Final Rule, 62 Fed. Reg. at 38,678/3-79/1. The dissent's defense of the fine particulate matter standard cites exactly such a justification. See Dissent at 6 ("The Agency explained that 'there is generally *greatest statistical confidence* in observed associations . . . for levels at and above the mean concentration [in certain studies]'") (emphasis added in dissent). But the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does.

The arguments EPA offers here show only that EPA is applying the stated factors and that larger public health harms (including increased probability of such harms) are, as expected, associated with higher pollutant concentrations. The principle EPA invokes for each increment in stringency (such as for adopting the annual coarse particulate matter standard that it chose here)—that it is "possible, but not certain" that health effects exist at that level, see PM Final Rule, 62 Fed.

Reg. at 38,678/3[2]—could as easily, for any non-threshold pollutant, justify a standard of zero. The same indeterminacy prevails in EPA's decisions *not* to pick a still more stringent level. For example, EPA's reasons for not lowering the ozone standard from 0.08 to 0.07 ppm—that "the more serious effects . . . are less certain" at the lower levels and that the lower levels are "closer to peak background levels," see Ozone Final Rule, 62 Fed. Reg. at 38,868/2—could also be employed to justify a refusal to reduce levels below those associated with London's "Killer Fog" of 1952. In that calamity, very high PM levels (up to 2,500 $\mu g/m^3$) are believed to have led to 4,000 excess deaths in a week.[3] Thus, the agency rightly recognizes that the question is one of degree, but offers no intelligible principle by which to identify a stopping point.

The latitude EPA claims here seems even broader than that OSHA asserted in *International Union, UAW v. OSHA* ("*Lockout/Tagout I*"), 938 F.2d 1310, 1317 (D.C. Cir. 1991), which was to set a standard that would reduce a substantial risk and that was not infeasible. In that case, OSHA thought itself free either to "do nothing at all" or to "require precautions that take the industry to the brink of ruin," with "all

---

[2] EPA did cite qualitative evidence for further support for its annual standard, and argued that the evidence "does not provide evidence of effects below the range of 40-50 $\mu g/m^3$," the standard level. PM Final Rule, 62 Fed. Reg. at 38,678/3. The referenced document, however, bears no indication that the qualitative evidence demonstrates effects at the level of the standard, either. See EPA, "Air Quality Criteria for Particulate Matter," at 13-79 (April 1996).

[3] See W.P.D. Logan, "Mortality in the London Fog Incident, 1952," The Lancet, Feb. 4, 1953, at 336-38.

positions in between . . . evidently equally valid." *Id.* Here, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart—the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all.

In *Lockout/Tagout I* certain special conditions that have justified an exceptionally relaxed application of the nondelegation doctrine were absent, *id.* at 1317-18, and they are equally absent here. The standards in question affect the whole economy, requiring a "more precise" delegation than would otherwise be the case, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935). No "special theories" justifying vague delegation such as the war powers of the President or the sovereign attributes of the delegatee have been or could be asserted. Nor is there some inherent characteristic of the field that bars development of a far more determinate basis for decision. (This is not to deny that there are difficulties; we consider some below.)

EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1161 (D.C. Cir. 1980). We agree. But none of those panels addressed the claim of undue delegation that we face here, and

accordingly had no occasion to ask EPA for coherence (for a "principle," to use the classic term) in making its "policy judgment." The latter phrase is not, after all, a self-sufficient justification for every refusal to define limits.

It was suggested at oral argument that EPA's vision of its discretion in application of § 109(b)(1) is no broader than that asserted by OSHA after a remand by this court and *upheld* by this court in *International Union, UAW v. OSHA* ("*Lock-out/Tagout II*"), 37 F.3d 665 (D.C. Cir. 1994). But there, in fact, OSHA allowed itself to set only standards falling somewhere between maximum feasible stringency and some "moderate" departure from that level. *Id.* at 669. As our prior discussion should have indicated, here EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog.

The dissent argues that a nondelegation challenge similar to this one was rejected in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), and cites that case's language that "the rationality of the means can be tested against goals capable of fairly precise definition in the language of science," *id.* at 677. See Dissent at 2. But the action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions—e.g., a prohibition on most new parking in the city, see 504 F.2d at 671, and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. *Lockout/Tagout I*, 938 F.2d at 1313. Doing so serves at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for three-judge panel). And such standards enhance the likelihood that meaningful judicial review will prove feasible. See *id.* at 759. A remand of this sort of course does not serve the third key function of non-delegation doctrine, to "ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) ("*Benzene*") (Rehnquist, J., concurring). The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage. In any event, we do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence. See *Mistretta v. United States*, 488 U.S. 361, 377-79 (1989).

What sorts of "intelligible principles" might EPA adopt? Cost-benefit analysis, mentioned as a possibility

in *Lock-out/Tagout I*, 938 F.2d at 1319-21, is not available under decisions of this court. Our cases read § 109(b)(1) as barring EPA from considering any factor other than "health effects relating to pollutants in the air." *NRDC*, 902 F.2d at 973; see also *Lead Industries*, 647 F.2d at 1148; *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *American Petroleum Inst.*, 665 F.2d at 1185 (echoing the same themes).

In theory, EPA could make its criterion the eradication of any hint of direct health risk. This approach is certainly determinate enough, but it appears that it would require the agency to set the permissible levels of both pollutants here at zero. No party here appears to advocate this solution, and EPA appears to show no inclination to adopt it.[4]

EPA's past behavior suggests some readiness to adopt standards that leave non-zero residual risk. For example, it has employed commonly used clinical criteria to determine what qualifies as an adverse health

---

[4] A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty). First, PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero. See PM Staff Paper at IV-1. Second, the combustion associated with pastoral life appears to be rather deadly. See World Bank, *World Development Report 1992: Development and the Environment* 52 (1992) (noting that "biomass" fuels (i.e., wood, straw, or dung) are often the only fuels that "poor households, mostly in rural areas" can obtain or afford, and that indoor smoke from biomass burning "contributes to acute respiratory infections that cause an estimated 4 million deaths annually among infants and children.").

effect. See Ozone Staff Paper at 59-60 (using American Thoracic Society standards to determine threshold for "adverse health effect" from ozone). On the issue of likelihood, for some purposes it might be appropriate to use standards drawn from other areas of the law, such as the familiar "more probable than not" criterion.

Of course a one-size-fits-all criterion of probability would make little sense. There is no reason why the same probability should govern assessments of a risk of thousands of deaths as against risks of a handful of people suffering momentary shortness of breath. More generally, all the relevant variables seem to range continuously from high to low: the possible effects of pollutants vary from death to trivialities, and the size of the affected population, the probability of an effect, and the associated uncertainty range from "large" numbers of persons with point estimates of high probability, to small numbers and vague ranges of probability. This does not seem insurmountable. Everyday life compels us all to make decisions balancing remote but severe harms against a probability distribution of benefits; people decide whether to proceed with an operation that carries a 1/1000 possibility of death, and (simplifying) a 90% chance of cure and a 10% chance of no effect, and a certainty of some short-term pain and nuisance. To be sure, all that requires is a go/no-go decision, while a serious effort at coherence under § 109(b)(1) would need to be more comprehensive. For example, a range of ailments short of death might need to be assigned weights. Nonetheless, an agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability. Possible building blocks for such a

principled structure might be found in the approach Oregon used in devising its health plan for the poor. In determining what conditions would be eligible for treatment under its version of Medicaid, Oregon ranked treatments by the amount of improvement in "Quality-Adjusted Life Years" provided by each treatment, divided by the cost of the treatment.[5] Here, of course,

---

[5] The "quality" of various health states was determined by poll, and medical professionals determined the probabilities and durations of various health states with and without the treatment in question.

Oregon was twice forced to revise its system because the United States Department of Health & Human Services detemined that the original proposal and a revision violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The reason given for this determination was that both versions undervalued the lives of persons with disabilities: The original plan measured quality of life according to the attitudes of the general population rather than the attitudes of persons with disabilities. See HHS, "Analysis Under the Americans with Disabilities Act ('ADA') of the Oregon Reform Demonstration" (Aug. 3, 1992), reprinted in 9 Issues in L. & Med. 397, 410, 410 (1994). The revised plan ranked treatments leaving the patient in a "symptomatic" state lower than those leaving the patient asymptomatic, and certain disabling conditions were considered "symptoms." See Letter from Timothy B. Flanagan, Assistant Attorney General, to Susan K. Zagame, Acting General Counsel, HHS (Jan. 19, 1993), reprinted in 9 Issues in L. & Med. 397, 418, 421 (1994). The Department's determination was extensively criticized when issued. See Maxwell J. Mehlman et al., "When Do Health Care Decisions Discriminate Against Persons with Disabilities?" 22 J. Of Health Politics, Policy & L. 1385, 1390 (1997) (HHS's "decision provoked a storm of disbelief and denunciation").

We take no position on whether HHS's view was correct, or if the underlying norm also governs EPA's decisions under § 109(b)(1). An affirmative answer, however, would not seem to preclude use of some of Oregon's approach. The first step would be giving appropriate weight to the views of persons with

EPA may not consider cost, and indeed may well find a completely different method for securing reasonable coherence. Alternatively, if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.

We have discussed only the primary standards. Because the secondary standards are at least in part based on those, see Ozone Final Rule, 62 Fed. Reg. at 38,875/3-76/1; PM Final Rule, 62 Fed. Reg. at 38,680/3, we also remand the cases to the agency with regard to the secondary standards as well, for further consideration in light of this opinion.

II. *Other General Claims*

The petitioners and amici contend that the EPA erroneously failed to consider a host of factors in revising the PM and ozone NAAQS. We reject each of these claims in turn.

---

disabilities. The second might be measuring the seriousness of a pollution-induced health effect by the *absolute* level of well-being that the effect brings about, not by the *decrease* in level that the effect causes. In other words, if the maximum well-being level is 100 and the average asthmatic whose asthma constitutes a disability has a well-being of 80 in the absence of air pollution (according to a measure that appropriately considers asthmatics' own assessments of their condition), then a response to air pollution that reduces the asthmatics' well-being to 70 could be counted as an effect of magnitude 30 (the difference from full health), rather than 10 (the difference from the level without the pollution). That approach would ensure that effects on persons with disabilities were not underestimated, even in the broad sense of that term apparently adopted by HHS.

A. Consideration of Cost in Revising Standards

As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. See *Lead Industries*, 647 F.2d at 1148 (D.C. Cir. 1980); see also *NRDC*, 902 F.2d at 973 (following *Lead Industries* in reviewing particulate matter NAAQS); *American Petroleum Inst.*, 665 F.2d at 1185 (same, in reviewing ozone NAAQS). The petitioners make four unsuccessful attempts to distinguish *Lead Industries* and its progeny.

First, the petitioners claim that in *Lead Industries* we held only that the Clean Air Act does not compel the EPA to consider the costs of implementation in setting a NAAQS; on the contrary, we held that the Act precludes the EPA from doing so. See *Lead Industries*, 647 F.2d at 1148 ("the statute and its legislative history make clear that economic considerations play no part in the promulgation of [NAAQS]").

Second, that we decided *Lead Industries* prior to the Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) does not, as the petitioners suggest, require us to revisit the earlier case. The *Lead Industries* decision was made in *Chevron* step one terms, see *id.*, as the post-*Chevron* progeny of *Lead Industries* have made clear. See *NRDC*, 902 F.2d at 973 ("Consideration of costs . . . would be flatly inconsistent with the statute, legislative history and case law on this point"); *NRDC v. EPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("*Vinyl Chloride*") ("[S]tatute on its face does not allow consideration of technological or economic feasibility. . . . Congress considered the

alternatives and chose to close down sources or even industries rather than to allow risks to health").

Third, though the petitioners are correct that in *Lead Industries* we interpreted § 109(b), which governs the setting of NAAQS, and not § 109(d), which governs the revising of NAAQS, we can discern no legally relevant difference in the two sections that would make *Lead Industries* inapplicable to § 109(d). Section 109(d)(1) directs the EPA to:

> complete a thorough review of the criteria published under section 7408 of this title and the [NAAQS] promulgated under this section and [to] make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.

42 U.S.C. § 7409(d)(1). The petitioners contend that consideration of costs is one pertinent factor in determining whether revision of a NAAQS is "appropriate," but this argument ignores the clause immediately following "appropriate," which incorporates § 109(b) and thereby affirmatively precludes consideration of costs in revising NAAQS. Section 108(b), 42 U.S.C. § 7408(b), does require the EPA to provide the States with information on the cost of implementing NAAQS, but the reference to § 108 does not permit consideration of costs in setting NAAQS because it clearly relates back to the requirement that the EPA "make . . . revisions in ["the criteria published under section 7408"] . . . as may be appropriate." And insofar as the air quality criteria do apply to the setting of NAAQS, they do so through § 109(b), which (again) precludes the consideration of costs and which is explicitly incorporated into

§ 109(d)(1). See *id.* § 7409(b)(1) (primary NAAQS to be "based on [the air quality] criteria" issued under § 108).

Fourth, the petitioners point to § 109(d)(2), which creates the CASAC and requires it to advise the EPA about, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." *Id.* § 7409(d)(2)(C)(iv). Why, ask the petitioners, would the CASAC be required to advise the EPA about these matters if the EPA were not then supposed to consider its advice in the course of revising the NAAQS? As above, however, the petitioners overlook that § 109(d)(1) directs the EPA to review and to revise, as appropriate, the air quality standards issued under § 108 as well as the NAAQS promulgated under § 109(b). The advice required in § 109(d)(2)(C)(iv) is pertinent only to the EPA's duty under § 108 to provide the States with control strategy information.

B. Environmental Consequences of Implementing NAAQS

The State Petitioners argue that the EPA erred in failing "to consider the environmental consequences resulting from the financial impact of the [revised $PM_{2.5}$ and ozone NAAQS] on the federal Abandoned Mine Reclamation Fund Act." This argument is squarely foreclosed by our decision in *NRDC*. In reviewing the EPA's previous revision of the PM NAAQS, we rejected the argument that the EPA "erred in refusing to consider the health consequences of unemployment in determining the primary [NAAQS] for particulate matter" and held that "[i]t is only *health effects relating to pollutants in the air* that EPA may consider." 902

F.2d at 972-73 (emphasis in original). Unlike the positive health benefits of ozone that we hold (in Part III.B, below) the EPA must consider, any detrimental health effects resulting from the financial impact upon the mine fund, like the health consequences of unemployment, are traceable to the cost of complying with the revised $PM_{2.5}$ and ozone NAAQS and not to the presence of those pollutants in the air.

C. The National Environmental Policy Act

In challenging both the revised $PM_{2.5}$ and ozone NAAQS, the State Petitioners also argue that the EPA failed to comply with certain requirements of the NEPA. The petitioners recognize that the Congress has exempted all actions under the Clean Air Act, including the setting of NAAQS, from the central requirement of the NEPA, namely, the preparation of an Environmental Impact Statement. Compare 42 U.S.C. § 4332(2)(C)-(D) (agency must prepare EIS in all "major Federal actions significantly affecting the quality of the human environment"), with 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA]"). Nonetheless, they suggest that the EPA is required to complete the functional equivalent of an EIS and also to comply with other requirements in the NEPA, see 42 U.S.C. § 4332(2)(B), (E), (G). State Petitioners' PM Brief at 20; State Petitioners' Ozone Brief at 19. We reject each of these suggestions.

First, the State Petitioners contend that this court has "recognized that the '[CAA], properly construed, requires the functional equivalent of a NEPA impact

statement,'" *id.* (quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (1973)). Our decision in *Portland Cement*, however, actually construed only "section 111 of the Clean Air Act." By replacing these words with "[CAA]" in their briefs, the petitioners misrepresent our interpretation of a single section of the Clean Air Act, dealing with emission standards for stationary sources, as an interpretation of the entire Act. Even if the petitioners were correct, however, *Portland Cement* predated, and is now superseded by, the statutory exemption in 15 U.S.C. § 793(c)(1), which the Congress added in 1974.

Second, the State Petitioners contend that a provision of the NEPA "requires that EPA weigh 'economic considerations.'" The section to which the petitioners refer reads as follows: "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). Even if this section is properly read generally to require an agency to consider implementation costs, § 109(d)(1) specifically prohibits the EPA from doing so. And the NEPA provides that it shall not "in any way affect the specific statutory obligations of any Federal agency . . . to comply with criteria or standards of environmental quality." 42 U.S.C. § 4334(1). Therefore, § 4332(2)(B) cannot require the EPA to disregard the prohibition in § 109(d)(1) upon the consideration of costs in setting NAAQS.

The State Petitioners' remaining arguments—that the EPA failed to comply with two other sections of the NEPA—fare little better. Section 4332(2)(E) requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." As with § 4332(2)(B), insofar as § 4332(2)(E) can be read to require the EPA to consider the costs of implementing NAAQS when revising those standards, contrary to the prohibition in § 109(d)(1), § 4334(1) prevents it from having any effect.

If, on the other hand, § 4332(2)(E) is understood in the context of the Clean Air Act to require the EPA merely to discuss implementation alternatives, then it, like the similar § 4332(2)(G) with which the petitioners also claim the EPA failed to comply, is the functional equivalent of § 108(b)(1). That section requires the EPA to provide the States with, among other things, "such data as are available on available technology and alternative methods of prevention and control of air pollution." As we recognize with regard to the requirement that the agency prepare an EIS, "[c]ompliance with NEPA's . . . requirement[s] has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are 'functional equivalents' of the [NEPA's] process." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 n.51 (1981). The rationale for the functional equivalence doctrine is the well-established principle that a "general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); see also *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499,

504-05 (11th Cir. 1990) (citing cases). The NEPA is the general statute requiring agencies to consider environmental harms, whereas the Clean Air Act is the more specific and its equivalent provisions apply in place of those in the NEPA. See *Portland Cement*, 486 F.2d at 386 (finding functional equivalence when more specific statute strikes "workable balance between some of the advantages and disadvantages of full application of NEPA").

Our analysis of the petitioners' contentions leads us to conclude that nothing in the NEPA requires the EPA in setting NAAQS to consider or to discuss matters that the Clean Air Act does not already permit or require.

D. The Unfunded Mandates Reform Act

The State Petitioners in the particulate matter case and Congressman Bliley in the ozone case both contend that the EPA is required by the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 *et seq.*, to prepare a Regulatory Impact Statement (RIS) when setting a NAAQS, see *id.* § 1532, and to choose the least burdensome from a range of alternative permissible NAAQS, see *id.* § 1535. Even if the petitioners and the amicus are correct regarding the interaction of the UMRA and the CAA—a point the EPA strongly contests—we can provide them with no relief. See *id.* § 1571(a)(3) ("[T]he inadequacy or failure to prepare [a RIS] . . . shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting [an] agency rule"); *id.* § 1571(b) ("Except as provided in [§ 1571(a), which does not mention § 1535,] . . . any compliance or noncompliance with the provisions of this chapter . . . shall not be subject to judicial review; and no provision of this

chapter shall be construed to [be] . . . enforceable by any person in any . . . judicial action").

The State Petitioners, recognizing the limitations upon judicial review in § 1571, contend that the EPA's failure to prepare a RIS can nonetheless render the NAAQS arbitrary and capricious, see 42 U.S.C. § 7607(d)(9), relying upon *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984). In that case, we interpreted a statute that, like the UMRA, both specified that the RIS be included in the record for judicial review and precluded judicial review of an agency's compliance with the RIS requirement. We held that a "reviewing court will consider the contents of the [RIS], along with the rest of the record, in assessing not the agency's compliance with the [requirement to prepare the RIS], but the validity of the rule under other provisions of law." *Id.* at 405. No information in a RIS, however, could lead us to conclude that the EPA improperly set the PM and ozone NAAQS; the only information such a statement would add to the rulemaking record for a NAAQS would pertain to the costs of implementation, see 2 U.S.C. § 1532(a), and the EPA is precluded from considering those costs in setting a NAAQS. Accordingly, the failure to prepare a RIS does not render the NAAQS arbitrary and capricious.

E. The Regulatory Flexibility Act

In both the ozone and particulate matter cases, the Small Business Petitioners argue that the EPA improperly certified that the revised NAAQS would not have a significant impact upon a substantial number of small entities. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No.

104-121, tit. II, 110 Stat. 857-74 ("SBREFA"), requires an agency, when engaging in notice and comment rulemaking, to "prepare and make available for public comment an initial regulatory flexibility analysis. . . . [that] describe[s] the impact of the proposed rule on small entities," 5 U.S.C. § 603(a), including small businesses, small organizations, and small governmental jurisdictions, see *id.* § 601(6). When promulgating a final rule, an agency must describe "the steps . . . taken to minimize the significant economic impact on small entities." *Id.* § 604(a)(5). According to the petitioners, if the EPA had complied with the RFA, it would likely have promulgated less stringent PM and ozone NAAQS than those actually chosen, which would have reduced the burden upon small entities.

A regulatory flexibility analysis is not required, however, if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b). Further, the SBREFA made no change in the requirement that a regulatory flexibility analysis conducted pursuant to the RFA include estimates of "the number of small entities to which the proposed rule will apply" and of "the classes of small entities which will be subject to the requirement." 5 U.S.C. § 603(b)(3)-(4). We have consistently interpreted the RFA, based upon these sections, to impose no obligation upon an agency "to conduct a small entity impact analysis of effects on entities which it does not regulate." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 & n.18 (1998).

The EPA certified that its revised NAAQS will "not have a significant economic impact on small entities within the meaning of the RFA." PM Final Rule, 62

Fed. Reg. at 38,702/2; Ozone Final Rule, 62 Fed. Reg. at 38,887/2-3. According to the EPA, the NAAQS themselves impose no regulations upon small entities. Instead, the several States regulate small entities through the state implementation plans (SIPs) that they are required by the Clean Air Act to develop. See 42 U.S.C. § 7410. Because the NAAQS therefore regulate small entities only indirectly—that is, insofar as they affect the planning decisions of the States—the EPA concluded that small entities are not "subject to the proposed regulation." See *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985); see also *id.* at 343 ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.").

The EPA's description of the relationship between NAAQS, SIPs, and small entities strikes us as incontestable. The States have broad discretion in determining the manner in which they will achieve compliance with the NAAQS. The EPA "is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards" and cannot reject a SIP based upon its view of "the wisdom of a State's choices of emission limitations," *Train v. NRDC*, 421 U.S. 60, 79 (1975) (emphasis in original), or of the technological infeasibility of the plan. See *Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976). Therefore, a State may, if it chooses, avoid imposing upon small entities any of the burdens of complying with a revised NAAQS. Only if a State does not submit a SIP that complies with § 110, 42 U.S.C. § 7410, must the EPA adopt an implementation plan of its own, which would require the EPA to decide what

burdens small entities should bear. The agency has stated, however, that it will do a regulatory flexibility analysis before adopting an implementation plan of its own, as it did in 1994 when proposing such a plan for Los Angeles. See Ozone Final Rule, 62 Fed. Reg. at 38,891/1; PM Final Rule, 62 Fed. Reg. at 38,705/3.

The responses of the Small Business Petitioners do not persuade us to reject the EPA's argument or to deviate from our holdings in *Mid-Tex* and its progeny. First, the Small Business Petitioners contend that we must defer to the Small Business Administration's interpretation of the Act, as expressed in a letter to the EPA from the SBA's Chief Counsel for Advocacy, that the NAAQS do impose requirements upon small entities. The SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory. See, e.g., 5 U.S.C. §§ 601(3), 602(b), 603(a), 605(b), 609(b)(1), 612. Therefore, we do not defer to the SBA's interpretation of the RFA. See *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (no *Chevron* deference owed to agency interpretation of statute it does not administer). Nor do we defer to the EPA's interpretation of the RFA, for it does not administer the Act either. We do, however, find the EPA's interpretation of the statute persuasive.

Second, the Small Business Petitioners argue that the EPA cannot claim both that the NAAQS will have no effect upon small entities and that it will have positive health effects. Clearly, however, the EPA can maintain that the NAAQS will have health effects because the Clean Air Act empowers the agency to ensure that such benefits accrue; and it can maintain

that the NAAQS will not directly affect small entities because it has no authority (short of imposing its own implementation plan upon a non-complying state) to impose any burdens upon such entities.

The Small Business Petitioners attempt to distinguish the possible effects upon small entities in this case from the indirect effects that, as we found in *Mid-Tex*, are not within the contemplation of the RFA. But *Mid-Tex* is not so easily distinguished. The petitioners in that case argued that the RFA required the FERC to consider economic effects not only upon regulated industries but also upon the small entities that are their wholesale customers, even though the customers were not directly regulated by the FERC. We rejected that argument, finding a "clear indication" in the language of § 603 that the RFA is "limited to small entities subject to the proposed regulation." *Mid-Tex*, 773 F.2d at 342; see also *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 467 n.18 ("The RFA itself distinguishes between small entities subject to an agency rule, to which its requirements apply, and those not subject to the rule, to which the requirements do not apply."); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (1996) (regulatory flexibility analysis provision applies only to "small entities *that are subject to the requirements of the rule*") (emphasis in original). That the Clean Air Act requires the States to submit SIPs that will achieve compliance with the NAAQS does not, in view of the States' nearly complete discretion to determine which entities will bear the burdens of a revised NAAQS, make such small entities as the SIPs may regulate any more subject to the EPA's regulation than were the wholesalers in *Mid-Tex* subject to regulation by the FERC.

Finally, the Small Business Petitioners suggest that the Congress in enacting the SBREFA overruled our prior interpretation of the RFA in *Mid-Tex* and its progeny. The SBREFA made a number of changes in the RFA, but it did not change anything in § 603 upon which we relied in *Mid-Tex*. And although the Congress made a slight modification in § 605(b), we do not understand it to alter our analysis in *Mid-Tex*. Prior to 1996, § 605(b) required an agency to provide "a succinct statement explaining the reasons" for its certification that the promulgated rule would not have a significant economic impact upon small entities. That section now requires "a statement providing the factual basis for such certification." Our decision in *Mid-Tex* contemplates that an agency may justify its certification under the RFA upon the "factual basis" that the rule does not directly regulate any small entities. Nothing in the change to § 605(b) suggests that basis for certification is no longer permissible. (Indeed, the section of the statute amending § 605(b) is labeled "Technical and Conforming Amendments," see SBREFA § 243, 110 Stat. at 866.) We therefore conclude that the EPA properly certified that its NAAQS would not have a significant impact upon a substantial number of small entities.

III. *Ozone*

A. Subpart 2 and the Revised Ozone Standard

In 1990 the Congress substantially revised the Clean Air Act by, among other things, adding specific enforcement provisions for carbon monoxide, particulate matter, sulfur oxides, nitrogen dioxide, lead, and as pertinent here, ozone. Previously, the Act required that all areas of the country not attaining the primary ozone standard, no matter how far from attainment, come into

compliance "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. § 7502 (1988). Many areas had not attained the primary ozone NAAQS by that date; some were still a long way from doing so. The Congress responded to the continued ozone problem by enacting a new enforcement scheme, which it codified as Subpart 2 of Part D of the Clean Air Act, 42 U.S.C. §§ 7511-7511f, redesignating the original provisions as Subpart 1.

Subpart 2 requires the EPA to classify nonattainment areas based upon their design value, which is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary ozone standard.[6] A table in

[6] More specifically, the design value is the fourth-highest daily maximum ozone concentration in an area over three consecutive years for which there are sufficient data. If that value is less than or equal to 0.12 ppm, then an area will have only three expected values above that level and it will be in attainment with the ozone NAAQS. See EPA, The Clean Air Act Ozone Design Value Study: Final Report 1-1 to 1-22 (1994) (filed pursuant to 42 U.S.C. § 7511b(g), which required the EPA to conduct "a study of whether the [existing design value] methodology . . . provides a reasonable indicator of the ozone air quality of ozone nonattainment areas"; the EPA concluded it did).

Subpart 2, set out here in the margin,[7] establishes classifications ranging from marginal to extreme, and provides an attainment date for each class. See *id.* § 7511(a)(1)-(2). Subpart 2 also specifies, for each class of nonattainment areas, both measures that the States must take to reduce emissions of the chemicals that are precursors of ozone and information that the States must report to the EPA. See *id.* § 7511a. In short, Subpart 2 is the Congress's comprehensive plan for reducing ozone levels throughout the country.

The State and Non-State Petitioners, along with Congressman Bliley appearing as an amicus curiae,

[7] This table appears in Clear Air Act § 181(a)(1), 42 U.S.C. § 7511(a)(1):

TABLE 1

Area Class	Design value [ppm]	Primary standard attainment date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	.9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

The Severe Area category is later subdivided, creating a sixth classification for ozone nonattainment areas. See id. § 7511(a)(2) ("Notwithstanding table 1, [for] a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years . . . after November 15, 1990").

argue that Subpart 2 precludes the EPA from revising the primary and secondary ozone NAAQS. We reject this argument (in Part III.A.1) insofar as it pertains to the EPA's continued ability to promulgate a revised ozone NAAQS or to designate areas as not in attainment with a revised NAAQS. We agree (in Part III.A.2) with those petitioners, however, insofar as they maintain, based upon the text and structure of Subparts 1 and 2, that the EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2. Further, we conclude (in Part III.A.3) that the EPA may not require a State to comply with a revised secondary ozone NAAQS in any area that has yet to attain the 0.12 ppm primary standard.

1. The EPA's Power to Revise the Ozone NAAQS and Designate Areas as Nonattainment

The 1990 amendments did not alter the section of the Clean Air Act that provides for setting and revising primary and secondary NAAQS. See 42 U.S.C. § 7409. The Administrator, therefore, still must "at five-year intervals [from December 31, 1980] . . . complete a thorough review of . . . the [NAAQS] promulgated under this section and . . . make such revisions in such . . . standards . . . as may be appropriate." *Id.* § 7409(d)(1). The Second Circuit held that this section continues to "set[ ] forth a bright-line rule for agency action," *American Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (1992), and we agree. Nothing in the Act modifies this "bright-line rule" or otherwise makes it inapplicable to revision of the ozone NAAQS.

To the extent that the 1990 amendments shed any light upon this question, they suggest that the EPA retains its authority to revise the ozone NAAQS. For example, if the EPA relaxes a NAAQS after enactment of the 1990 amendments, then "the Administrator shall . . . promulgate requirements applicable to all areas which have not attained that [relaxed] standard as of the date of such relaxation. . . . [which] shall provide for controls . . . not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Although two other subsections of § 172 are expressly made inapplicable to the ozone regulations in Subpart 2, see *id.* § 7502(a)(1)(C), (a)(2)(D), this so-called anti-backsliding provision contains no such exemption. Accordingly, as the EPA notes, this section specifically contemplates that the agency may relax its ozone NAAQS and, therefore, necessarily implies that it retains the authority to revise that NAAQS. Tellingly, neither the petitioners nor the amicus reply to this point.

The petitioners and amicus raise two other arguments to support their position that the EPA cannot alter the ozone NAAQS without the approval of the Congress. We reject both in short order.

First, the Non-State Petitioners contend that Subpart 2 renders revision of the ozone NAAQS "inappropriate" within the meaning of § 109(d)(1), which provides the EPA shall "make such revisions in such . . . standards . . . as may be appropriate." 42 U.S.C. § 7409(d)(1). This argument, however, pointedly ignores the text immediately following the word "appropriate," which specifies that appropriateness is to be determined "in accordance with section 7408 . . . and

[§ 7409(b)]" (and which, as we read it, means exclusively in accord with those sections). See, e.g., *American Methyl Corp. v. EPA*, 749 F.2d 826, 835-36 (D.C. Cir. 1984). Because Subpart 2 is neither listed in § 109(d)(1) nor incorporated by reference in either § 108, *id.* § 7408, or §109(b), it cannot render revision of the ozone NAAQS inappropriate.

Second, the State Petitioners and Congressman Bliley argue, based upon the classification table in § 181(a)(1), *id.* § 7511(a)(1), that Subpart 2 codified the 0.12 ppm ozone NAAQS and, therefore, only the Congress can promulgate a revised NAAQS. Yet not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher. In fact, this was true of areas designated nonattainment for ozone as a result of the 1990 amendments, see Ozone Final Rule, 62 Fed. Reg. at 38,884/3, at least in part because of the stringent criteria in the Clean Air Act for changing the designation of an area to attainment from nonattainment. See 42 U.S.C. § 7407(d)(3)(E)(iii) (redesignation permissible only if area's attainment of NAAQS "is due to permanent and enforceable reductions in emissions"). In short, although the numbers in the classification table are based upon the 0.12 ppm ozone NAAQS, they are neither equivalent to nor a codification of the NAAQS.

Not only does the EPA, as we conclude above, retain authority to promulgate a revised ozone NAAQS; the agency is still required, "in no case later than 2 years from the date of promulgation" of a revised NAAQS, to designate areas as attainment, nonattainment, or unclassifiable under that NAAQS. *Id.* § 7407(d)(1)(B). Although the 1990 amendments extended by roughly 18

months the maximum time between promulgation of a revised NAAQS and designation of nonattainment areas under that NAAQS, see 42 U.S.C. § 7407(d)(1)-(2) (1988), they made no substantive change in the EPA's authority to designate areas as nonattainment under a revised NAAQS. Therefore, we hold that the EPA retains the power to designate areas as nonattainment under a revised ozone NAAQS.

2. The EPA's Power to Enforce the Revised Ozone Standard

That the enactment of Subpart 2 does not alter the EPA's authority to revise the ozone NAAQS or to designate areas as nonattainment for ozone does not, however, compel the conclusion that Subpart 2 has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS (We consider the enforcement of secondary ozone NAAQS in Part III.A.3, below.) In fact, the text and structure of Subparts 1 and 2 suggest precisely the opposite conclusion. After designating an area as nonattainment under a NAAQS, the EPA normally looks to Subpart 1 for authority to "classify the area for the purpose of applying an attainment date." 42 U.S.C. § 7502(a)(1)-(2). The cited provisions, however, do not apply "with respect to nonattainment areas for which classifications [and attainment dates] are specifically provided under other provisions of [Part D of Subchapter 1 of the Clean Air Act]." *Id.* § 7502(a)(1)(C), (a)(2)(D).

The EPA argues that Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the 0.12 ppm ozone NAAQS.

The State and Non-State Petitioners counter that Subpart 2 specifically provides classifications and dates for all areas designated nonattainment under any ozone NAAQS. We agree with the petitioners.

The pertinent provision of Subpart 2 reads as follows:

> (a) **Classification and attainment dates for 1989 nonattainment areas.** - (1) Each area designated non-attainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area. . . .

Id. § 7511(a)(1). As the petitioners note, § 107(d), 42 U.S.C. § 7407(d), specifies three different times at which an area can be designated "nonattainment for ozone": immediately following enactment of the 1990 amendments, *id.* § 7407(d)(4); after the EPA revises the ozone NAAQS, *id.* § 7407(d)(1); and when an area that was in attainment, either when the Congress enacted the 1990 amendments or when the EPA promulgated a revised ozone NAAQS, later ceases to comply, *id.* § 7407(d)(3). The petitioners conclude from the general reference to § 107(d) that the classifications and attainment dates in Subpart 2 apply to areas designated under §§ 107(d)(1), (3), and (4). The EPA gamely responds that the reference to § 107(d) includes only subsection (4), but we do not defer to the agency's interpretation because we find that the Congress has spoken on the "precise question at issue" and we "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). We canvass the two reasons that lead us to

this conclusion before returning to the EPA's argument.

First, the reference to § 107(d) in § 181(a)(1) appears to have been purposeful and not the drafting error that the EPA's interpretation implies. The Congress considered but did not adopt bills that clearly would have limited the reach of Subpart 2 to nonattainment designations made immediately following enactment of the 1990 amendments. The Senate bill contained a version of Subpart 2 that classified only those areas designated nonattainment for ozone under its equivalent of § 107(d)(4). See S. 1630, 101st Cong. §§ 101, 107, reprinted in III Legislative History of the Clean Air Act Amendments of 1990, at 4124-25, 4195 [hereinafter 1990 Legislative History]. The version of Subpart 2 in the House bill, as originally introduced, similarly referred only to designations made under its equivalent of § 107(d)(4). See H.R. 3030, 101st Cong. §§ 101(a), 103, reprinted in II 1990 Legislative History, at 3748-49, 3795-96 The House committee, however, replaced the specific reference to what is now § 107(d)(4) with a general reference to § 107(d). See H.R. Rep. No. 101-490, at 3-6, 17 (1990), reprinted in II 1990 Legislative History, at 3027-30, 3041. The Conference committee then reported the text of the House bill rather than that of the Senate. See H.R. Rep. No. 101-952, at 335 (1990), reprinted in I 1990 Legislative History, at 1785.

Second, our conclusion that the Congress intentionally referred to § 107(d) as a whole is supported by a comparison of Subparts 1 and 2. The Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring areas into attainment with the 0.12 ppm standard in the allotted time. See H.R. Rep. No.

101-490, at 145-50, reprinted in II 1990 Legislative History, at 3169-74. Rather than continue treating all ozone nonattainment areas alike, the Congress allowed the various areas between 3 and 20 years to attain the ozone NAAQS, depending upon the extent of the area's ozone problem. See *id.* at 146-47 ("In 1977, Congress tried to waive [sic] a 'magic wand' and command that all nonattainment areas [for ozone] will meet the applicable [NAAQS]. . . . by December 31, 1987. . . . [That] date[ ] ha[s] come and gone and it is clear that ... we had no 'magic' solutions."), reprinted in II 1990 Legislative History, at 3170-71. As the petitioners argue, because the 1990 amendments extended the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS, they must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS.

Subpart 1 requires compliance with a primary NAAQS "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment." 42 U.S.C. § 7502(a)(2)(A). All nonattainment areas would have until 2012 to comply with the revised ozone NAAQS if the EPA and the States were to take the full time authorized in Subpart 1 for making attainment designations and the EPA were to approve every possible extension for each area. See *id.* §§ 7407(d)(1)(A)-(B), 7502(a)(2)(A), (C). Such wide discretion is inconsistent, however, with Subpart 2, in which the Congress stripped the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment (with two limited exceptions not relevant here, see *id.* § 7511(a)(4), (5)). Moreover, under § 181(a) of Subpart 2, Los Angeles, the nation's only Extreme Area, has until 2010 to attain the

0.12 ppm ozone NAAQS, and the possibility of extending that deadline until 2012. That Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2.

The EPA offers two arguments against this interpretation of Subparts 1 and 2. First, the EPA contends that a recent statute confirms its power to designate nonattainment areas under the revised ozone standard. See Pub. L. No. 105-178, § 6103(a), 112 Stat. 465 (1998) (extending time to two years from one year for governor to submit proposed designation under 0.08 ppm ozone NAAQS). That statute also specifically states, however, that "[n]othing in section[ ] . . . 6103 shall be construed by the Administrator of Environmental Protection Agency or any court . . . to affect any pending litigation or to be a ratification of the ozone . . . standard[ ]." *Id.* § 6104. Further, even if the EPA were correct that § 6103 confirms the agency's power to designate areas under a revised ozone NAAQS, that power was never in doubt, as we concluded above. Indeed, § 6104 simply does not bear upon the question we address here: whether Subpart 1 or Subpart 2 provides the applicable enforcement mechanisms for an area designated nonattainment under a revised ozone NAAQS.

Second, the EPA argues that read in context the reference to § 107(d) in § 181(a)(1) relates only to designations made under § 107(d)(4). Because the table in § 181(a)(1) classifies areas based upon a design value that roughly measures attainment of the 0.12 ppm ozone NAAQS, the EPA contends that the nonattain-

ment designations referenced in § 181(a)(1) are only those designations made under the 0.12 ppm ozone NAAQS. This explanation, however, does not square with either the Congress's decision not to refer to § 107(d)(4) specifically or the long-term nature of the attainment scheme enacted in Subpart 2; on the EPA's interpretation, that scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments.

The EPA points next to § 181(b)(1), which specifies the attainment dates for areas that met the 0.12 ppm standard when the Congress enacted the 1990 amendments but that later cease to comply. That section, however, applies only to areas designated under § 107(d)(3) that previously were "designated attainment or unclassifiable for ozone under section [107(d)(4)]." That § 181(b)(1) provides special rules for such areas, but not for areas designated under § 107(d)(3) that had previously been designated attainment for ozone or unclassifiable under § 107(d)(1), does not support the EPA's argument that the phrase in § 181(a)(1) "designated nonattainment for ozone pursuant to section 107(d)" denotes only those designations made under § 107(d)(4). If anything, the specification of § 107(d)(4) in § 181(b)(1) makes its absence from § 181(a)(1) all the more striking.

The final bit of context to which the EPA points is the title of § 181(a): "Classification and attainment dates for 1989 nonattainment areas." Because the title specifies "1989 nonattainment areas," we are told, § 181(a) must refer only to nonattainment designations made immediately after enactment of the 1990 amendments, that is, designations made under § 107(d)(4).

Although "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), a title cannot be allowed to create an ambiguity in the first place. See *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 9 (1941) ("[T]he title of an act will not limit the plain meaning of the text."). The text of § 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d). There simply is no ambiguity in need of resolution by reference to the title of the section.

In sum, § 181(a) "specifically provide[s]" for classifications and attainment dates for areas designated nonattainment for ozone pursuant to § 107(d)(1). Accordingly, Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, see 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D), and the EPA must enforce any revised primary ozone NAAQS under Subpart 2.

3. The Secondary Ozone NAAQS

The Non-State Petitioners briefly contend that our conclusion that Subpart 2 provides the classifications and attainment dates for areas designated nonattainment under a revised primary ozone NAAQS is equally applicable to the enforcement of a revised secondary ozone NAAQS. We find it impossible to conclude, however, that Subpart 2 "specifically provide[s]" for classifications and attainment dates for areas designated nonattainment with a revised secondary ozone NAAQS; § 181(a)(1) expressly refers only to primary NAAQS and Subpart 2 not once mentions secondary NAAQS. Further, attainment dates in Subpart 1 for

secondary standards are less stringent than for primary standards, making comparison with the more lenient dates in Subpart 2 less troubling. Compare *id.* § 7502(a)(2)(B) (attainment of secondary NAAQS "shall be . . . achieved as expeditiously as practicable after the date such area was designated nonattainment"), with *id.* § 7502(a)(2)(A) (attainment of primary NAAQS "shall be . . . achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment"). Nonetheless, we understand Subpart 2 to codify the Congress's judgment as to what is "as expeditiously as practicable" in reducing an area's level of ozone. Consequently, the EPA is precluded from requiring any steps toward compliance with a revised secondary ozone NAAQS prior to an area's attainment of the 0.12 ppm standard. In areas that meet the 0.12 ppm standard, however, Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

B. Ozone's Health Benefits

Petitioners presented evidence that according to them shows the health benefits of tropospheric ozone as a shield from the harmful effects of the sun's ultraviolet rays—including cataracts and both melanoma and nonmelanoma skin cancers. In estimating the effects of ozone concentrations, EPA explicitly disregarded these alleged benefits.

EPA explained its decision first as a matter of statutory interpretation. Under the Clean Air Act, EPA's ambient standards for any pollutant are to be "based on [the] criteria" that EPA has published for that pollutant. 42 U.S.C. § 7409(b)(1) & (2). The "criteria," in turn, are to "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." *Id.* § 7408(a)(2). The reference to "all identifiable effects" would seem on its face to include beneficent effects.

EPA attempts to avoid this straightforward reading in several ways. First, it points to the term "such pollutant," arguing that the statute requires it to focus exclusively on the characteristics that make the substance a "pollutant." But the phrase "pollutant" is simply a label used to identify a substance to be listed and controlled by the statute. While it is perfectly true that a substance known to be utterly without adverse effects could not make it onto the list, this fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of "identifiable effects."

EPA also relies on the fact that two of the three specified considerations under § 108(a)(2)'s general mandate refer to "adverse effect[s]":

> The criteria for an air pollutant, to the extent practicable, shall include information on–
>
> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such

pollutant to produce an *adverse* effect on public health or welfare; and

(C) any known or anticipated *adverse* effects on welfare.

Id. § 7408(a)(2) (emphasis added). EPA's argument would be of uncertain force even if all three types of effects specifically required to be considered were spoken of as "adverse effects"; there is no reason to read "adverse" back into the "all identifiable effects" of § 108(a)(2). But as one of the three specified classes refers to "effects" unmodified, *id.* § 7408(a)(2)(A), we can reject EPA's argument without even reaching that issue. That Congress qualified "effects" in clauses (B) and (C) with "adverse" seems only to strengthen the supposition that in (A)—and in the general mandate—it intended to cover *all* health or welfare effects. Therefore if petitioners' contentions are right, clause (A) applies to ozone: the presence of ultraviolet radiation at various levels "alter[s] the effects [of ozone] on public health or welfare" by making them on the whole less malign—perhaps even beneficial.

EPA next argues that Title VI of the Clean Air Act, *id.* §§ 7671-7671q, which mandates certain measures to preserve *stratospheric* ozone, represents a complete consideration of ozone's beneficial role as a UV shield. Petitioners' claim, however, is that ground-level (tropospheric) ozone—the subject of this rule—has a UV-screening function independent of the ozone higher in the atmosphere. EPA points to nothing in the statute that purports to address tropospheric ozone.

Finally, EPA directs us towards legislative history from the 1970 and 1990 Clean Air Act Amendments.

The "all identifiable effects" language, however, dates to the 1967 Amendments. Legislative history from the 1970 and 1990 Congresses cannot be "an authoritative interpretation of what the [1967] statute meant," because it is "the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566 (1988).

Under *Chevron*, we defer to an agency's interpretation of a statute if "the statute is silent or ambiguous with respect to the specific issue" and "the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. We find no such ambiguity in this case. Further, EPA's interpretation fails even the reasonableness standard of *Chevron*'s second part: it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance. At oral argument even EPA counsel seemed reluctant to claim that the statute justified disregard of the beneficent effects of a pollutant bearing directly on the health symptoms that accounted for its being thought a pollutant at all (suppose, for example, a chemical that both impedes and enhances breathing, depending on the person or circumstances); he also seemed unable to distinguish that case from the one here—where the chemical evidently impedes breathing but provides defense against various cancers.

Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109. EPA's other arguments are

technical, and are of two sorts: those that allegedly show petitioners' studies to be fatally flawed and those that allegedly show specific inflation of results in these studies. We need only consider the first sort, for EPA chose to give the studies no weight at all.

Petitioners rely primarily on studies by Lutter and Cupitt. EPA found that these could be ignored because the marginal benefits are difficult, if not impossible, to quantify reliably and because there is "no convincing basis for concluding that any such effects . . . would be significant." But these are not the criteria by which EPA assesses adverse health effects. It does not rigorously or uniformly demand either quantifiability, see, e.g., Ozone Final Rule, 62 Fed. Reg. at 38,860/3 (admitting that "quantitative risk estimates could not be developed" for certain adverse effects of ozone on which EPA regulated); EPA Ozone Brief at 48 (defending consideration of various effects that "played an important role in the Administrator's final decision" despite absence of quantification: "EPA did not estimate the risk for such effects because 'information [was] too limited to develop *quantitative* estimates,'—not because there is doubt the effects occur.") (alteration and emphasis in original) (citation omitted), or any specific level of significance. As we can see no reason for imposing a higher information threshold for beneficent effects than for maleficent ones, we have no basis for affirming EPA's decision to disregard the studies.

As we said above, we are remanding to EPA to formulate adequate decision criteria for its ordinary object of analysis—ill effects. We leave it to the agency on remand to determine whether, using the same approach as it does for those, tropospheric ozone has a beneficent

effect, and if so, then to assess ozone's net adverse health effect by whatever criteria it adopts.

IV. *Particulate Matter*

A. PM_{10} as Coarse Particle Indicator

We now turn to petitioners' challenges to the Agency's regulation of coarse particulate pollution. Both the 1987 NAAQS and the proposed standards regulate all particles with diameters under 10 micrometers, signified by the indicator PM_{10}. The PM_{10} spectrum includes both coarse and fine particles. While the main distinction between coarse and fine particles is the process by which they are produced, EPA and epidemiologists who study the health effects of particulate pollution identify coarse and fine particles through rough approximations of those particles' diameters. Coarse particles, which become airborne usually from the crushing and grinding of solids, generally have diameters between 2.5 and 10 micrometers and can thus be identified by the indicator $PM_{10\text{-}2.5}$. Fine particles, indicated in these new NAAQS by $PM_{2.5}$, come mainly from combustion or gases and generally have diameters of 2.5 micrometers or less.

Despite EPA's conclusion that coarse and fine particles pose independent and distinct threats to public health, the Agency chose not to adopt an indicator, such as $PM_{10\text{-}2.5}$, that would measure only the coarse fraction of PM_{10}. Petitioners make two arguments: that there is no scientific basis for regulating coarse particles at all, and that even if there were, retention of the PM_{10} indicator simultaneously with the establishment of the new fine particle indicator is unsupported by evidence

in the record and arbitrary and capricious. We agree with this latter argument.

Beginning with petitioners' first challenge, we think the record contains sufficient evidence to justify the Agency's decision to regulate coarse particulate pollution. While the relationship between PM_{10} pollution and adverse health effects justifying the 1987 NAAQS was well-established, see *NRDC v. EPA*, 902 F.2d 962, 967-68 (D.C. Cir. 1990), two studies contained in the record of these proceedings concentrated specifically on the health effects caused by the coarse fraction of PM_{10} pollution. See Mary Ellen Gordian et al., "Particulate Air Pollution and Respiratory Disease in Anchorage, Alaska," 104 Envtl. Health Persp. 290 (1996) (studying volcanic ash); Brockton J. Hefflin et al., "Surveillance for Dust Storms and Respiratory Diseases in Washington State, 1991," 49 Archives of Envtl. Health 170 (1994) (studying fugitive dust). In addition, the record contains at least nine multivariate analyses finding statistically significant relationships with health effects for both $PM_{2.5}$ and PM_{10}, suggesting that the portion of PM_{10} pollution unaccounted for by $PM_{2.5}$ (i.e., coarse particles) explains some of the observed adverse health effects. In other words, because regression analysis holds the $PM_{2.5}$ component constant, the PM_{10} effect recognized in these equations actually evidences results from coarse particulate pollution. To be sure, petitioners have pointed to some evidence to the contrary. But given that our review is limited to "ascertaining that the choices made by the Administrator were reasonable and supported by the record," and does not include "judg[ing] the merits of competing expert views," *Lead Industries*, 647 F.2d at 1160, we find ample support for EPA's decision to regulate coarse particulate pollution above the 1987 levels.

Having found independent health consequences from coarse particulate pollution, EPA nevertheless decided to regulate the coarse fraction of PM_{10} indirectly, using PM_{10} (which includes both coarse and fine PM) as a "surrogate for coarse fraction particles." PM Final Rule, 62 Fed. Reg. at 38,668/2. While recognizing that $PM_{10-2.5}$ would have served as a satisfactory coarse particle indicator, EPA offers three justifications for its decision to use PM_{10} instead: (1) Both the Gordian and Hefflin studies used PM_{10}, not $PM_{10-2.5}$, as the variable in their models, (2) the PM_{10} standards will work in conjunction with the $PM_{2.5}$ standards by regulating the portion of particulate pollution not regulated by the $PM_{2.5}$ standards, and (3) a nationwide monitoring program for PM_{10} already exists. We find none of these explanations persuasive.

As to the first argument, while acknowledging that the indicator used in the studies captures both coarse and fine particles, EPA nevertheless maintains that PM_{10} is an effective indicator for the regulation of coarse particulate pollution. "Adopting the indicator used in the studies," the Agency says, "increases the likelihood that the level selected will result in the health protections predicted." But as EPA's own staff paper suggests, PM_{10} is "inherently confounded" by the presence of $PM_{2.5}$ particles, meaning that any regulation of PM_{10} pollution will include both coarse and fine particles. See PM Staff Paper at V-59. Using PM_{10} as the coarse particle indicator, instead of $PM_{10-2.5}$, will thus regulate more than just the coarse fraction of PM_{10}, and the amount of coarse particulate pollution

permitted will depend (quite arbitrarily) on the amount of $PM_{2.5}$ pollution in the air. For example, assuming the 50 microgram annual PM_{10} level adopted by the Agency and a region with an annual $PM_{2.5}$ pollution level of 15 micrograms, the PM_{10} indicator would prohibit coarse particulate ($PM_{10-2.5}$) pollution from exceeding 35 micrograms. But in an area with only 5 micrograms of $PM_{2.5}$ pollution, the NAAQS would permit coarse particulate pollution to reach as high as 45 micrograms.

EPA's second argument—that the PM_{10} standard will work in conjunction with the $PM_{2.5}$ standard—suffers from the same deficiency. Accepting EPA's finding of "profound physicochemical differences" between coarse and fine PM, PM Staff Paper at V-59, such that each requires independent regulation, we cannot discern exactly how a PM_{10} standard, instead of a $PM_{10-2.5}$ standard, will work alongside a $PM_{2.5}$ standard to regulate only the coarse fraction of PM_{10}. EPA provides no explanation to aid us in understanding its decision. In fact, as the example above indicates, it is the very presence of a separate $PM_{2.5}$ standard that makes retention of the PM_{10} indicator arbitrary and capricious. Far from working in conjunction to regulate coarse particles, PM_{10} and $PM_{2.5}$ indicators, when used together, lead to "double regulation" of the $PM_{2.5}$ component of PM_{10} and potential underregulation of the $PM_{10-2.5}$ component since the amount of $PM_{10-2.5}$ permitted will always depend on the amount of $PM_{2.5}$ in the air.

EPA's final argument is pragmatic. It maintains that PM_{10} is a better indicator than $PM_{10-2.5}$ for coarse particulate pollution because a nationwide monitoring program for PM_{10} already exists. But as EPA acknowledges elsewhere in its brief, *NRDC* bars EPA from

considering factors unrelated to public health in setting air quality standards. Echoing our decision in *Vinyl Chloride*, *NRDC* held that "the Administrator may not consider cost and technological feasibility in determining what is 'safe'; such a determination 'must be based solely upon the risk to health.'" *NRDC*, 902 F.2d at 973 (quoting *Vinyl Chloride*, 824 F.2d 1146, 1166 (D.C. Cir. 1990) (in banc)); see also *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1148-55. The administrative convenience of using PM_{10} cannot justify choosing an indicator poorly matched to the relevant pollution agent.

In view of our conclusion that PM_{10} amounts to an arbitrary indicator for coarse particle pollution, we need not address petitioners' separate challenge to the PM_{10} levels or secondary standards. We note, however, that whatever levels the Agency ultimately selects for coarse particle pollution will need to comply with the requirements set forth in Part I of this opinion.

B. Fine Particles as "New Pollutant"

The Attorneys General of Ohio, Michigan, and West Virginia ("state petitioners") argue that EPA is regulating $PM_{2.5}$ for the first time. Because they consider $PM_{2.5}$ to be a "new pollutant," they argue that § 108 of the Clean Air Act requires EPA to conduct further research on $PM_{2.5}$'s health effects before listing it as a pollutant, to issue an air quality criteria document reflecting the latest science on the health effects of the pollutant, and to assist states by developing "data relating to the cost of installation and operation, energy requirements, emission-reduction benefits, and environ-

mental impact of the emission control technology." 42 U.S.C. § 7408(b)(1).

Although EPA never responds to this argument, five northeastern states (as respondent intervenors and amici) do. Pointing out that previous NAAQS have always included $PM_{2.5}$, these attorneys general support the EPA's decision not to list $PM_{2.5}$ separately as a new pollutant. We agree.

The state petitioners cannot escape the fact that the original standards for particulate pollution using Total Suspended Particulates (TSP) as indicator, as well as the 1987 NAAQS that used PM_{10}, included by definition every particle 2.5 micrometers and smaller. Moreover, in some areas fine particles often dominate PM_{10} pollution. See PM Staff Paper at V-63. By refining the NAAQS to focus on smaller particles that EPA found posed distinct threats to public health, EPA has done with these regulations exactly what we held it could do in 1987 when it made the change from Total Suspended Particulates to PM_{10}. See *NRDC*, 902 F.2d at 965-66. EPA's decision to update the NAAQS to focus on $PM_{2.5}$ merely continues a trend based on evolving science. It does not violate the provisions of § 108 of the Clean Air Act.

C. Failure to Identify a Biological Mechanism for Particulate Pollution's Relationship to Adverse Health Effects

Also challenging the establishment of a fine particle standard, non-state petitioners argue that EPA failed to explain the biological mechanism through which particulate pollution causes adverse health effects. Even if epidemiological studies show robust statistical relationships between pollution and health effects, they say, the absence of proof of causation—i.e., how particles actually interact with cells and organs to cause sickness and death—is fatal to the standard. We disagree.

To begin with, the statute itself requires no such proof. The Administrator may regulate air pollutants "emissions of which, in his judgment, *cause or contribute* to air pollution which may *reasonably be anticipated* to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (1994) (emphasis added). Moreover, this court has never required the type of explanation petitioners seek from EPA. In fact, we have expressly held that EPA's decision to adopt and set air quality standards need only be based on "reasonable extrapolations from some reliable evidence." *NRDC v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986). Indeed, were we to accept petitioners' view, EPA (or any agency for that matter) would be powerless to act whenever it first recognizes clear trends of mortality or morbidity in areas dominated by a particular pathogen.

The numerous epidemiological studies appearing in this record, some of which EPA also used to support the 1987 NAAQS, easily satisfy the standard articulated in the statute and emphasized repeatedly in decisions of this court. Covering diverse geographic locations with widely varying mixes of air pollution, the studies found statistically significant relationships between air-borne particulates signified by a variety of indicators and adverse health effects. Given EPA's statutory mandate to establish standards based on "the latest scientific knowledge," 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and

adverse health effects amply justifies establishment of new fine particle standards.

D. Visibility Effects

The Environmental Petitioners challenge the EPA's decision to set the secondary $PM_{2.5}$ NAAQS at levels equivalent to the primary NAAQS. According to the petitioners, the EPA's failure to set the secondary NAAQS at more stringent levels will result in "adverse visibility impacts" in parts of the country. In view of our conclusion in Part I, above, that the EPA has not adequately explained the principles upon which it relied in setting the levels in the NAAQS for PM, we need not reach the main thrust of the petitioners' challenge to the secondary NAAQS. On the other hand, the Environmental Petitioners have also raised a question of statutory interpretation, the resolution of which should assist the EPA if it revisits its decision to set the secondary $PM_{2.5}$ NAAQS.

In the PM Final Rule, the EPA decided "to address the welfare effects of PM on visibility by setting secondary standards identical to the suite of $PM_{2.5}$ primary standards, in conjunction with the establishment of a regional haze program under § 169A of the Act." PM Final Rule, 62 Fed. Reg. at 38,679/3. Section 169A "declares as a national goal the prevention . . . and the remedying of any . . . impairment of visibility in mandatory class I Federal areas . . . result[ing] from manmade air pollution." 42 U.S.C. § 7491. Mandatory class I areas include all international parks, and national parks and wilderness areas of a certain size. See 42 U.S.C. § 7472(a). The EPA concluded that reduction of $PM_{2.5}$ levels in class I areas would benefit the surrounding areas as well because "the same haze that

degrades visibility within or looking out from a national park also degrades visibility outside it." PM Final Rule, 62 Fed. Reg. at 38,682/1.

The Environmental Petitioners argue that § 109(b)(2), 42 U.S.C. § 7409(b)(2), requires the EPA to set secondary NAAQS at a level sufficient to eliminate all adverse visibility effects and that it leaves the EPA no discretion to decide that some visibility impairment is better remedied through another program. This argument must be wrong. For, as the EPA argues, the Congress required the EPA to implement a regional haze program specifically in order to address adverse visibility effects that persist in class I areas after attainment of the secondary NAAQS. See 42 U.S.C. § 7470(1) (purpose of this part of Clean Air Act is "to protect public . . . welfare from any actual or potential adverse effect which . . . may reasonably be anticipate[d] to occur . . . notwithstanding attainment and maintenance of all [NAAQS]"). Accordingly, we conclude that the Congress did not intend the secondary NAAQS to eliminate all adverse visibility effects and, therefore, that the EPA acted within the scope of its authority in deciding to rely upon the regional haze program to mitigate some of the adverse visibility effects caused by $PM_{2.5}$.

Conclusion

We remand the cases to EPA for further consideration of all standards at issue. We do not vacate the new ozone standards because the standard is unlikely to engender costly compliance activities in light of our determination that it cannot be enforced by virtue of Clean Air Act § 181(a), 42 U.S.C. § 7511(a). We vacate the challenged coarse particulate matter stan-

dards because EPA will have to develop different standards when it corrects the arbitrarily chosen PM_{10} indicator. As to the fine particulate matter standards, we invite briefing on the question of remedy: possibilities include but are not limited to vacatur, non-vacatur subject to application to vacate, and non-vacatur.[8] An order giving the briefing particulars will follow.

Because of the substantial investment of time this matter has required and the many unresolved issues bearing on application of whatever standards may emerge, this panel will in the interest of judicial economy retain jurisdiction over the cases following remand. See *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983).

[8] Briefing should address the possibility that the previous particulate matter standard will spring back to life in response to our decision to vacate the new coarse particulate matter standard.

TATEL, *Circuit Judge*, dissenting from Part I:

The Clean Air Act has been on the books for decades, has been amended by Congress numerous times, and has been the subject of regular congressional oversight hearings. The Act has been parsed by this circuit no fewer than ten times in published opinions delineating EPA authority in the NAAQS-setting process. Yet this court now threatens to strike down section 109 of the Act as an unconstitutional delegation of congressional authority unless EPA can articulate an intelligible principle cabining its discretion. In doing so, the court ignores the last half-century of Supreme Court non-delegation jurisprudence, apparently viewing these permissive precedents as mere exceptions to the rule laid down 64 years ago in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Because section 109's delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld since *Schechter Poultry*, and because the record in this case demonstrates that EPA's discretion was in fact cabined by section 109, I respectfully dissent.

Section 109 requires EPA to publish air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (1994). Compare section 109 to the language of section 303 of the Communications Act of 1934, which gave the FCC authority to regulate broadcast licensing in the "public interest," and which the Supreme Court sustained in *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). The FCC's general

authority to issue regulations "as public convenience, interest, or necessity requires" was sustained in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Supreme Court has sustained equally broad delegations to other agencies, including the Price Administrator's authority to fix "fair and equitable" commodities prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), the Federal Power Commission's authority to determine "just and reasonable" rates, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944), the War Department's authority to recover "excessive profits" earned on military contracts, *Lichter v. United States*, 334 U.S. 742, 778-786 (1948), and the Attorney General's authority to regulate new drugs that pose an "imminent hazard to public safety," *Touby v. United States*, 500 U.S. 160, 165 (1991). *See also Milk Indus. Foundation v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest").

Given this extensive Supreme Court precedent sustaining general congressional delegations, no wonder the First Circuit rejected a similar nondelegation challenge to the Clean Air Act's "requisite to protect the public health" language:

> The power granted to EPA is not "unconfined and vagrant". [*Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring).] The Agency has been given a well defined task by Congress—to reduce pollution to levels "requisite to protect the public health", in the case of primary standards. The Clean Air Act outlines the approach to be followed by the Agency and describes in detail many of its powers. . . . Yet

> there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science.
>
> Administrative agencies are created by Congress because it is impossible for the Legislature to acquire sufficient information to manage each detail in the long process of extirpating the abuses identified by the legislation; the Agency must have flexibility to implement the congressional mandate. Therefore, although the delegation to EPA was a broad one, . . . we have little difficulty concluding that the delegation was not excessive.

South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974).

I do not agree with my colleagues that *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) ("*Lockout/Tagout I*"), requires a different result. That case remanded to OSHA for a more precise definition of section 3(8) of the Occupational Safety and Health Act, which granted the Agency authority to enact workplace safety standards "reasonably necessary or appropriate to provide safe or healthful employment or places of employment." *Id.* at 1316. The Clean Air Act does not delegate to EPA authority to do whatever is "*reasonably* necessary or appropriate" to protect public health. Instead, the statute directs the Agency to fashion standards that are "requisite" to protect the public health. In other words, EPA must set pollution standards at levels *necessary* to protect the public health,

whether "reasonable" or not, whether "appropriate" or not.

Moreover, in setting standards "requisite to protect the public health" EPA discretion is not unlimited. The Clean Air Act directs EPA to base standards on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2); see id. § 7409(b)(1); *see also id.* § 7408(a)(2) (requiring air quality criteria, "to the extent practicable," to "include information on—(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant; (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and (C) any known or anticipated adverse effects on welfare"). Indeed, the principles constraining EPA discretion are at least as specific as those this court sustained in *Lockout/Tagout II*, i.e., that OSHA must identify a " 'significant' safety risk, to enact a safety standard that provides 'a high degree of worker protection'." *International Union, UAW v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) ("*Lockout/Tagout II*"). By directing EPA to set NAAQS at levels "requisite"—not reasonably requisite—to protect the public health with "an adequate margin of safety," the Clean Air Act tells EPA exactly the same thing, i.e., ensure a high degree of protection.

Although this court's opinion might lead one to think that section 109's language permitted EPA to exercise unfettered discretion in choosing NAAQS, the record shows that EPA actually adhered to a disciplined decisionmaking process constrained by the statute's directive to set standards "requisite to protect the public health" based on criteria reflecting the "latest scientific knowledge." To identify which health effects were "significant enough" to warrant protection, EPA followed guidelines published by the American Thoracic Society. *See National Ambient Air Quality Standards for Ozone: Proposed Decision*, 61 Fed. Reg. 65,716, 65,722/1 (1996). It then set the ozone and fine particle standards within ranges recommended by CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act. *See* 42 U.S.C. § 7409(d)(2).

CASAC must consist of at least one member of the Nation- al Academy of Sciences, one physician, and one person representing state air pollution control agencies. *See id.* § 7409(d)(2)(A). In this case, CASAC also included medical doctors, epidemiologists, toxicologists and environmental scientists from leading research universities and institutions throughout the country. EPA must explain any departures from CASAC's recommendations. *See id.* § 7607(d)(3). Bringing scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) ("'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology today is what distinguishes science

from other fields of human inquiry.'") (citation omitted). Other federal agencies with rulemaking responsibilities in technical fields also rely heavily on the recommendations, policy advice, and critical review that scientific advisory committees provide. *See, e.g.*, 21 U.S.C. § 355(n) (describing scientific advisory panels for the Food and Drug Administration); 49 U.S.C. § 44912(c) (creating a scientific advisory panel for the Federal Aviation Administration).

Beginning with CASAC's ozone recommendations—not one member recommended going below .08 ppm—EPA gave two perfectly rational explanations for the level it selected. First, it set the annual level based on the different types of health effects observed above and below .08 ppm. Particularly below .08, the Agency determined, "[t]he most certain [ozone-]related effects, while judged to be adverse, are *transient and reversible*." *National Ambient Air Quality Standards for Ozone*, 62 Fed. Reg. 38,856, 38,868/2 (1997) (emphasis added). Characterizing this explanation as saying nothing more than that "lower exposure levels are associated with lower risk to public health," Maj. Op. at 10, my colleagues find the Agency's reasoning unintelligible. But EPA did not find simply that public health risks decrease at lower levels. Instead, it found that public health effects *differ* below .08 ppm, i.e., that they are "transient and reversible."

Second, EPA explained that the level should not be set below naturally occurring background ozone concentrations. The Agency selected .08 ppm because it found that "a 0.07 ppm level would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of [ozone] precursors,

and thus more likely to be inappropriately targeted in some areas on such sources." 62 Fed. Reg. at 38,868/3. Of course, any level of ozone pollution above background concentrations is closer to background levels than one just above it. *See* Maj. Op. at 11. But as I read EPA's explanation, the Agency found that peak background levels sometimes occur at .07 ppm, not at .08 ppm. Indeed, the data EPA provided in its "Responses to Significant Comments" show a range of background concentrations from a low of .042 ppm in Olympic National Park in Washington to a high of .075 ppm in Quachita National Forest in Arizona. No region registered background levels above .075 ppm. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONSES TO SIGNIFICANT COMMENTS ON THE 1996 PROPOSED RULE ON THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE 94-96 (July 1997). In other words, by setting the annual standard at .08 rather than .07 ppm, EPA ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not because of uncontrollable natural levels of ozone.

EPA offered an equally reasonable explanation for the fine particle pollution standard. Again limiting itself to the range approved by CASAC, EPA set the annual standard for $PM_{2.5}$ pollution at the lowest level where it had confidence that the epidemiological evidence (filtered through peer-reviewed, published studies) displayed a statistically significant relationship between air pollution and adverse public health effects.

Recognizing that its decision must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public

health," 42 U.S.C. § 7408(a)(2), EPA focused on three studies in the record that displayed a statistically significant relationship between fine particle pollution and adverse health effects: Joel Schwartz et al., *Is Daily Mortality Associated Specifically with Fine Particles?*, 46 J. AIR & WASTE MGMT. ASS'N 927 (1996); Joel Schwartz et al., *Acute Effects of Summer Air Pollution on Respiratory Symptom Reporting in Children*, 150 AM. J. RESPIRATORY & CRITICAL CARE MED. 1234 (1994); and Douglas W. Dockery et al., *An Association between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753 (1993). The Agency explained that "there is generally *greatest statistical confidence* in observed associations [between fine particle pollution and adverse health effects] for levels at and above the mean concentration [of pollution observed in the studies that showed a statistically significant relationship]." National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,676/1 n.42 (1997) (emphasis added). Allowing "an adequate margin of safety," EPA then set the annual fine particle standard just below the lowest mean pollution levels observed in those studies, at 15 $\mu g/m^3$. *See id.* at 38,676/1 ("An examination of the long-term means from the combined six city analyses of daily mortality [Schwartz et al. (1996)] and morbidity [Schwartz et al. (1994)], together with those from studies in individual cities for which statistically significant PM-effects associations are reported . . . finds mean concentrations ranging from about 16 to about 21 $\mu g/m^3$. . . ."); *id.* at 38,676/2 ("[The EPA] Staff Paper assessment of the concentration-response results [from Dockery et al. (1993)], concluded that the evidence for increased risk was more apparent at annual concentrations at or above 15 $\mu g/m^3$. . . .").

In a passage directly answering this court's concerns, *see* Maj. Op. at 11-12, the Staff Paper explained why the long-term mean served as a reasonable level for setting the fine particle NAAQS:

> The mean (or median) concentration may serve as a reasonable cutpoint of increased PM health risk since at this point there is generally the *greatest confidence* (i.e., the smallest confidence intervals) in the association and the reported [relative risk] estimates. The mean concentration considered by staff as most informative to test implications of potential alternative concentration-response functions is the *minimum mean concentration* associated with a study or studies reporting statistically significant increases in risk across a number of study locations. . . .

OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. ENVIRONMENTAL PROTECTION AGENCY, REVIEW OF NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION, at E-4 (1996) (emphasis added).

EPA thus did not, as my colleagues charge, arbitrarily pick points on the ozone and particulate pollution continua indistinguishable from any other. Instead, acting pursuant to section 109's direction that it establish standards that, based on the "latest scientific knowledge" are "requisite" to protect the public health with "an adequate margin of safety," and operating within ranges approved by CASAC, the Agency set the ozone level just above peak background concentrations where the most certain health effects are not transient

and reversible, and the fine particle level at the lowest long-term mean concentration observed in studies that showed a statistically significant relationship between fine particle pollution and adverse health effects. Whether EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies (as petitioners argue), or whether EPA failed to live up to the principles it established for itself (as my colleagues believe, *see* Maj. Op. at 9-12), has nothing to do with our inquiry under the nondelegation doctrine. Those issues relate to whether the NAAQS are arbitrary and capricious. *See NRDC v. EPA*, 902 F.2d 962, 969, 971 (D.C. Cir. 1989). The Constitution requires that Congress articulate intelligible principles; Congress has done so here.

A final point. Unlike OSHA, which *Lockout/Tagout I* recognized has authority to reach into every workplace to dictate what is safe, to impose extensive civil and criminal penalties, and "to decide which firms will live and which will die," *Lockout/Tagout I*, 938 F.2d at 1318, EPA regulates primarily by setting standards for states to develop their own plans. *See* 42 U.S.C. § 7401(a)(3) (Congress finds "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."). Indeed, because states have three years to submit implementation plans, which are themselves subject to notice, comment, public hearing, and frequent renegotiation, we will not know for years precisely how the ozone and particle NAAQS will actually affect individual businesses. Only if a state fails to produce an acceptable plan can EPA terminate federal highway funds or impose its own implementation plan. Because the Clean Air Act gives politically accountable

state governments primary responsibility for determining how to distribute the burdens of pollution reduction and therefore how the NAAQS will affect specific industries and individual businesses, courts have less reason to second-guess the specificity of the congressional delegation. Moreover, if the states disagree with the standards EPA has set, they have 535 representatives in Congress to turn to for help. In fact, legislation to overturn the very NAAQS at issue in this case was introduced in the last Congress. *See* H.R. 1984, 105th Cong. (1997) ("A bill to provide for a four-year moratorium on the establishment of new standards for ozone and fine particulate matter under the Clean Air Act, pending further implementation of the Clean Air Act Amendments of 1990, additional review and air quality monitoring under that Act."); S. 1084, 105th Cong. (1997) ("A bill to establish a research and monitoring program for the national ambient air quality standards for ozone and particulate matter and to reinstate the original standards under the Clean Air Act, and for other purposes.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Nos. 97-1440, 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582,97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

Nos. 97-1441, 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97-1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

[Filed October 29, 1999]

BEFORE: WILLIAMS, GINSBURG, AND TATEL, Circuit Judges.

Opinion PER CURIAM on petitions for rehearing.

Opinion concurring in partial grant of rehearing and dissenting in part from the panel's denial of rehearing filed by Circuit Judge TATEL.

ORDER

PER CURIAM

This matter is before the court for consideration of respondent Environmental Protection Agency's (EPA) petition for panel rehearing in Nos. 97-1440 and 97-1441, the responses thereto, and the petitions for panel rehearing of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizen for Balanced Transportation, et al. in No. 97-1440, and the American Lung Association in Nos. 97-1440 and 97-1441. Upon consideration of the foregoing, it is

ORDERED that the petitions of EPA, New Jersey and Massachusetts, and the American Lung Association be granted in part. The court accordingly modifies Parts III.A.2 & .3 and the conclusion of the court's original opinion as set forth in the opinion of the court filed herein this date. It is

FURTHER ORDERED that the remainder of EPA, New Jersey and Massachusetts, and the American Lung Association's petitions be denied and that Citizen for Balanced Transportation's petition be denied.

Opinion for the Court filed PER CURIAM:

The Environmental Protection Agency petitions for rehearing, challenging this court's holdings that: (1) with respect to the factors the agency uses to determine the degree of public health concern associated with different levels of a pollutant, it "appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute," *American Trucking Ass'ns v. United States Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999); (2) "Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, and the EPA must enforce any revised primary ozone NAAQS under Subpart 2," *id.* at 1050; and (3) "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109," *id.* at 1052. For the following reasons, we grant the petition for rehearing in part and deny it in part.

I. Delegation

In the EPA's petition for rehearing, counsel for the agency argue that § 109 of the Clean Air Act contains the following principle limiting the agency's discretion: "The levels [set in a NAAQS] must be *necessary* for public health protection: neither *more* nor *less* stringent than necessary, but 'requisite.'" EPA Pet. at 8 (emphases in original). Further, counsel claim that in setting the NAAQS at issue in this case the agency

applied corollaries of this principle, one for particulate matter, one for ozone,[1] to derive determinate standards.

In denying the EPA's petition for rehearing on this issue, we note that the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom. To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects.[2] In its briefs defending the NAAQS, the EPA merely asserted that the Clean Air Act provides an intelligible principle; it failed both to state that principle and to argue that its revised NAAQS were promulgated in accordance with that principle. EPA PM Brief at 145-49; EPA Ozone Brief at 77-80. Indeed, the EPA's briefs in each of these two cases contained the same four sentences

---

[1] For particulate matter, counsel now state that the EPA's decision was determined by the norm of "the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation." EPA Pet. at 15. For ozone, counsel now state that EPA inferred the existence of effects below 0.08 ppm, but nonetheless concluded that they were "less serious because they are 'transient and reversible.'" EPA Pet. at 16.

[2] The court's opinion mentioned EPA's observation in the record that effects of ozone concentrations below the standard selected were "transient and reversible," 175 F.3d at 1035, but only in connection with the dissent's suggestion, see *id.* at 1059, that this was the controlling principle.

assuring the court that the statute provides a principle without explaining what the agency understands that principle to be:

> [Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently interpreted § 109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's discretion. EPA Ozone Brief at 78; *see also* EPA PM Brief at 148.

These sentences begged the key question about that intelligible principle: "What is it?"

As we noted in our first opinion in this case, when "statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. Counsel for the EPA have now extracted from the statute what they contend is an intelligible principle limiting the EPA's discretion. We express no opinion upon the sufficiency of that principle; only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine. *See Yakus v. United States*, 321 U.S. 414, 424-26 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel).

A final word about our nondelegation holding: The Supreme Court has long held that an ambiguous principle in a statute delegating power to an agency can gain "meaningful content from the purpose of the Act, its factual background and the statutory context in which [it] appear[s]." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946); *see also Federal Radio Comm'n v. Nelson Bros. Bond & Mort. Co*, 289 U.S. 266, 285 (1933) (upholding delegation to Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires" in light of "its context [and] the nature of radio transmission and reception"; *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947) (upholding delegation to the Federal Home Loan Bank Board to promulgate regulations for the appointment of a conservator for savings and loan associations in view of the banking industry's "well-defined practices for the appointment of conservators"). This court has done the same. *See, e.g., National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 376 n.12 (1982) (finding an intelligible principle to guide the tribunal in disbursing cable royalty fees in "specific statements in the legislative history and in the general philosophy of the Act itself"); *Amalgamated Meat Cutters*, 337 F. Supp. at 747-49 (interpreting the Economic Stabilization Act of 1970 in light of "the historic context of government stabilization measures" in order to "negative[ ] a conclusion that the whole program was set adrift without a rudder"). To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since *Chevron* it has been clear that "[t]he responsibilities for assess-

ing the wisdom of such policy choices . . . are not judicial ones." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984). Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. *But see* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 713 (1969) (arguing that "judicial inquiries [under the nondelegation doctrine] should shift from statutory standards to administrative safeguards"). In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*. *See Industrial Union Dep't v. American Petroleum Inst. (Benzene)*, 448 U.S. 607, 642, 646 (1980) (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding . . . that significant risks are present," thereby finding in the statute an intelligible principle).[3]

II. Subpart 2 and the Revised Ozone Standard

In its petition for rehearing, the EPA challenges the holdings in Parts III.A.2 and III.A.3 of our original opinion, *see* 175 F.3d at 1048-51, as well as our jurisdiction to reach those issues. We address the jurisdictional point first.

[3] We note that Judge Silberman's dissent from the denial of rehearing *en banc* turns largely on his dim view of the Court's use of the non-delegation doctrine in *Benzene*, which he characterizes as "only a makeweight, tossed into the analysis . . . to help justify the result." Whatever the merits of Judge Silberman's critique of *Benzene*, we do not see how a lower court can properly rest its jurisprudence on the rejection of a Supreme Court decision.

A. Jurisdiction

The EPA argues that because it has taken no final action implementing the revised NAAQS this court lacks jurisdiction to reach the question whether Subpart 2 prevents the agency from implementing a revised ozone NAAQS under Subpart 1. *See* 42 U.S.C. § 7607(b) (limiting this court's jurisdiction to review of "nationally applicable regulations promulgated, or final agency action taken, by the Administrator"); *see also Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987).[4] That this claim is raised for the first time in a petition for rehearing does not, of course, alter our obligation to "satisfy [our]self . . . of [our] own jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012-13 (1998).

Whether agency action is final for purposes of § 7607(b) entails a functional, not a formal, inquiry. *See NRDC v. EPA*, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position . . . and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review"). In this case, "there is nothing tentative about the EPA's interpretation of

[4] The EPA has yet to designate an area nonattainment. Therefore, although the agency does not so argue, if it were correct, then this court would also lack jurisdiction to decide, as it did, that Subpart 2 does not alter the agency's power to designate areas as nonattainment under a revised NAAQS. *See* 175 F.3d at 1047-48.

[Subpart 2]; it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990); *see also* Final Rule: National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,885/2 (1997) ("There is no language in sections 181 or 182 that precludes the implementation of a different [ozone] standard under other authority [i.e., Subpart 1]; those provisions [i.e., Subpart 2] simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard"). Moreover, by promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states, the first being that the Governor of each state must determine which areas do not presently comply with the revised NAAQS; those areas that do not comply will ultimately be required to do so. The EPA, therefore, has reached a final decision regarding its power to implement its revised ozone standard, which this court has jurisdiction to review.[5]

[5] The EPA attempts to buttress its jurisdictional argument by reference to 42 U.S.C. § 7502(a)(1)(B), which it claims "defers challenges to EPA's implementation decisions classifying areas for setting attainment dates until EPA takes final action on a SIP . . . or triggers sanctions . . . [after] a state fails to submit a SIP." EPA Pet. at 19. The section to which the EPA refers states as follows: "The Administrator shall publish a notice in the Federal Register announcing each [attainment or nonattainment] classification. . . . Such classification . . . shall not be subject to judicial review until the Administrator takes final action under [the statutes the EPA cites in its petition]." That is, the EPA's decision to classify a particular area as attainment or nonattainment is not subject to review merely because the EPA published that decision in the Federal Register. Neither this section nor the analogous § 7511(a)(3), to which the EPA also cites, prevents a court from deciding, prior to the classification of a particular area, whether the agency has validly promulgated a revised standard.

The EPA also argues that the statements in its preamble regarding implementation are not "ripe for review," a point which it raised in a single sentence in its original brief to this court. EPA Pet. at 19; EPA Ozone Brief at 74. The question whether Subpart 2 prevents the EPA from designating an area as nonattainment under its revised ozone standard or from implementing that designation except in conformity with Subpart 2 is a pure question of law, the resolution of which would not benefit from a more concrete setting. As the agency's action is undoubtedly final, the question is fit for review. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540-41 (D.C. Cir. 1999).

B. Subpart 2 and the EPA's Authority to Enforce a Revised Ozone Standard

The EPA's arguments in its petition for rehearing do not convince us that we erred in rejecting the EPA's contention that "the reference to §107(d) in §181(a)(1) relates only to designations made under § 107(d)(4)," 175 F.3d at 1050, and in holding instead that "§ 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d)." *Id.* Indeed, we note that the EPA has abandoned its original position, arguing now that the "most logical reading" of § 181(a) is that the reference to § 107(d) includes §§ 107(d)(1)(C) and 107(d)(4). EPA Pet. at 24. We find this new reading no more persuasive than the old. As the EPA notes, all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d). *See* 42 U.S.C. §§ 7502(a)(1)(A), 7511(a)(1), 7512(a)(1), 7513(a), 7514(a). It is by no

means clear, however, that the references to § 107(d) in Subparts 1 and 3 through 5 include only designations made under §§ 107(d)(1)(C) and (d)(4). Not only does the EPA never argue that they are so limited, but on its theory the reference to § 107(d) in Subpart 1 also encompasses designations made under § 107(d)(1)(A). EPA Pet. at 25. Accordingly, we reject the EPA's new interpretation of § 181(a), for it is contrary to "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

Still, the EPA does raise two points relating to Subpart 2 which lead us to grant the EPA's petition for rehearing in part and to make the following revisions to our opinion.

The EPA correctly points out that we erroneously treated the attainment dates in the table in Subpart 2 as representing the Congress's judgment about what is "as expeditiously as practicable" in reducing the level of ozone in an area; in fact, those dates represent what the Congress set as outer limits. *See* 42 U.S.C. § 7511(a)(1) ("For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1"). EPA Pet. at 25 n.35. Accordingly, we grant the EPA's petition for rehearing to the extent of deleting the final three sentences of Part III.A.3, *see* 175 F.3d at 1051, and substituting for them the following sentence:

> Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

The EPA also contends that the conclusion to Part III.A.2, *see id.* at 1050 ("the EPA must enforce any revised primary ozone NAAQS under Subpart 2"), conflicts with our description of that same conclusion at the end of the opinion, *see id.* at 1057 (revised ozone NAAQS "cannot be enforced by virtue of [Subpart 2]"). We agree that the two sentences are in tension. To clarify the matter, we grant the EPA's petition for rehearing to the extent of making the following two revisions to our original opinion. First, we replace the final paragraph of Part III.A.2, *see id.* at 1050, with the following:

> In sum, because the reference to §107(d) in § 181(a)(1) includes the designation of an area as nonattainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2.

Second, we replace the second sentence of the Conclusion, *see id.* at 1057, with the following:

> We do not vacate the new ozone standards because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2.

As with the $PM_{2.5}$ NAAQS, our decision not to vacate the ozone NAAQS "is without prejudice to the ability of any party to apply for vacatur in the future, should circumstances develop in which the presence of this

standard threatens a more imminent harm." *American Trucking Ass'ns, Inc. v. EPA*, No. 97-1440 (D.C. Cir. Jun. 18, 1999).

III. Beneficent Health Effects

The arguments in the EPA's petition for rehearing give us no reason to doubt the correctness of our conclusion that "all identifiable effects," as used in CAA §108(a)(2), "on its face . . . include[s] beneficent effects." 175 F.3d at 1051. Nor do those arguments warrant consideration in a published opinion. We express no opinion, of course, upon the effect, if any, that studies showing the beneficial effects of tropospheric ozone, *see id.* at 1052, might have upon any ozone standard the EPA may promulgate on remand.

IV. Conclusion

For the above reasons, the EPA's petition for rehearing is

Granted in part and denied in part.

TATEL, Circuit Judge, concurring in part and dissenting in part:

I concur in the partial grant of rehearing with respect to enforcement of the revised ozone standard because, as modified, the opinion now leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates. While I too think that we have jurisdiction to decide the enforcement issue, I write separately because I do not entirely agree with the rationale of the modified panel opinion.

The panel understood EPA's original position to be that, although Subpart 2 limited the Agency's enforcement of the pre-existing one-hour 0.12 ppm ozone NAAQS, it "has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS." *American Trucking Associations v. EPA*, 175 F.3d 1027, 1048 ("ATA"). That interpretation, the panel held, not only conflicted with section 7511(a)(1)'s text and legislative history, *see id.*, 175 F.3d at 1048-49, but by leaving the Agency free to "requir[e] areas to comply either more quickly or with a more stringent ozone NAAQS," it defied Congress's clear intent to "extend[ ] the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS." *Id.* at 1049.

Having rejected the Agency's interpretation, the panel went on to agree with petitioners that Subpart 2 embodies "a comprehensive enforcement scheme" that "specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." *Id.* at 1049, 1048 (emphasis added). This holding meant that areas not covered by Table 1 in

Subpart 2—i.e. those with one-hour ozone design values below 0.121 ppm-were completely exempt from any ozone regulation whatsoever. Although the panel acknowledged that EPA must continue to revise the NAAQS, *see id.* at 1047, it concluded that the revised standard "cannot be enforced by virtue of [Subpart 2]." *Id.* at 1057.

After reading EPA's petition for rehearing and the various responses, I no longer believe that it was "the unambiguously expressed intent of Congress" to command EPA to revise the ozone standards, while denying it the power to enforce them. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842. Table 1 specifically provides classifications and attainment dates for some areas, but as EPA points out, "it establishes *no* attainment dates or classifications for nonattainment areas with 'design values' lower than 0.121 ppm." EPA Pet. Reh'g at 22-23. As the Agency argues, it is thus difficult to see how Subpart 2 can "specifically provide[ ]" attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1. *See id.* at 22-24. This gap in Table 1 makes it at least ambiguous whether Subpart 2 "*specifically* provide[s]" classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS.

EPA also points out that treating Subpart 2 as the exclusive enforcement scheme for all areas leads to "irrational and contradictory consequences." *Id.* at 23. Subpart 2 provides that "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified . . . under table 1, by operation of law. . . ." 42 U.S.C. § 7511(a)(1). Even if the panel is correct that the reference to section 7407(d) includes

designations under a revised NAAQS pursuant to section 7407(d)(1)(A), *see* Slip Op. on Reh'g at 9-10, the fact remains that the only "nonattainment areas for which classifications [and attainment dates] are specifically provided under" Table 1 are those having one-hour ozone design values of 0.121 ppm or greater. *ATA*, 175 F.3d at 1048 (quoting 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D)). Classifying other areas "under table 1, by operation of law" is thus impossible or, at the very least, not "unambiguously" "specifically provided for." And although, as the panel noted, "a title [of a statute or section] cannot be allowed to create an ambiguity in the first place," *id.*, at 1050, the ambiguity in this statute—Can section 7511(a)(1) be applied literally to areas that have attained the old standard but fail to meet the new one?—appears in the text of Subpart 2 itself.

Moreover, EPA has offered a plausible interpretation of the statute that reasonably reconciles the provisions of Subparts 1 and 2. In its Petition for Rehearing, the Agency states that "Subpart 2 addresses continued nonattainment for the primary one-hour ozone standard," EPA Pet. Reh'g at 20, while Subpart 1 provides implementation authority for the new ozone standard in areas that have already attained the old one, *see id.* at 20-22. The Agency articulated this same reading of the statute in its original brief, stating that "consistent with Congress' intent, EPA interpreted the Subpart 2 provisions to remain in place for areas not attaining the one-hour standard, and concluded the one-hour standard should continue to apply until EPA determines that an area attains that standard, thus facilitating continued implementation of the relevant Subpart 2 measures." EPA Ozone Brief at 72. The final

rulemaking—the Agency action we are reviewing here—is even clearer about the relationship between Subparts 1 and 2:

> [A]t the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996) under which the provisions of subpart 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.
>
> In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.
>
> To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should remain applicable to areas that are not attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

62 Fed. Reg. 38,873 (1997), *cited in* EPA Ozone Brief at 72. *See also* 40 C.F.R. § 50.9(b) (continuing to apply the one-hour 0.12 ppm standard until it is attained).

To be sure, EPA's original brief did seem to advance the position the panel rejected—that in enforcing the new ozone NAAQS, the Agency is free to disregard altogether Subpart 2's timetable. *See* EPA Ozone Brief at 69-71. Given the clarity of the final rule, however, I no longer believe that EPA actually intended to argue that it could subvert Subpart 2's schedule in enforcing the new ozone NAAQS. When EPA's lawyers said in the original brief that Subpart 2 is inapplicable to nonattainment areas under the new ozone standard, I assume they must have meant that even under the new standard, Subpart 2 continues to apply to areas covered by Table 1—not that Subpart 2 no longer applies at all. Viewed this way, EPA's original brief and its petition for rehearing are perfectly consistent with the final rule: all three interpret the Act to mean that Subpart 2 still applies to an area until it attains the one-hour 0.12 ppm standard. This interpretation puts to rest the panel's concern that Subpart 2's attainment schedule "would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *ATA*, 175 F.3d at 1050.

The Agency's petition also explains the practical consequences of its interpretation of Subpart 2. Although EPA may not enforce a stricter ozone standard in Los Angeles earlier than the year 2012, *see id.* at 1049, the

Agency need not wait for Los Angeles to achieve the old standard before requiring the rest of the country to move toward cleaner air. *Cf.* EPA Pet. Reh'g at 25 (suggesting that Los Angeles "is the only area of the nation" where compliance with the 0.08 ppm NAAQS under Subpart 1 could possibly be required at the same time as compliance with the 0.12 ppm NAAQS under Subpart 2). In other words, Table 1 functions as a safe harbor for areas like Los Angeles whose ozone levels exceed 0.121 ppm.

To sum up, the panel rejected what it was led to believe was EPA's view that Subpart 2 applied only to nonattainment areas under the old standard but no longer applies at all under the new standard. The panel held instead that Subpart 2 applies to *all* nonattainment areas under *any* standard, foreclosing implementation of a new standard in any area not covered by Table 1. EPA has now clarified its interpretation of the Act. A middle ground originally articulated in its final rulemaking, the Agency's position harmonizes its general enforcement authority under Subpart 1 with the specific provisions of Subpart 2. Subpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under Subpart 1.

I would have granted rehearing and held that the Agency's position represents a reasonable interpretation of an ambiguous statute. *See Chevron*, 467 U.S. at 844 (upholding EPA's construction of NAAQS attainment provisions of the Clean Air Act, stating that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation

made by the administrator of an agency."). I nonetheless concur in the judgment because the revised opinion's statement that "the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2" leaves open the possibility that the new ozone standard can be implemented in areas that have attained the old standard.

For the reasons set forth in my statement dissenting from the denial of rehearing *en banc*, I respectfully dissent from the denial of rehearing as to Part I of the panel opinion ("Delegation").

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Nos. 97-1440, 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582,97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Nos. 97-1441, 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97-1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

On Respondent EPA's Suggestion for Rehearing
En Banc

[Filed October 29, 1999]

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, Circuit Judges.

Circuit Judges WALD and KAREN LECRAFT HENDERSON did not participate in this matter.

Chief Judge HARRY T. EDWARDS and Circuit Judges SILBERMAN, ROGERS, TATEL, and GARLAND would grant the suggestion.

A statement of Circuit Judge SILBERMAN dissenting from the denial of rehearing *en banc* is attached.

A statement of Circuit Judge SILBERMAN dissenting from the denial of rehearing en banc is attached.

A statement of Circuit Judge TATEL dissenting from the denial of rehearing *en banc*, in which Chief Judge EDWARDS and Circuit Judge GARLAND join, is attached.

PER CURIAM

Respondent EPA's Suggestion for Rehearing *En Banc* and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

SILBERMAN, Circuit Judge, dissenting from the denial of rehearing *en banc*:

The panel's reliance on the nondelegation doctrine to reject EPA's interpretation of section 109 of the Clean Air Act is rather ingenious, but I regret that it seems to me to be fundamentally unsound. I do not think that doctrine can be employed to force an agency to narrow a broad legislative delegation from Congress.

The doctrine, as Judge Tatel in dissent pointed out, *American Trucking Associations v. EPA*, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) ("*ATA*") (Tatel, J., dissenting in part), is at this stage of constitutional "evolution" not in particularly robust health. Justice Rehnquist heroically attempted to inject vitality into the doctrine in his powerful concurrence in the *Benzene* case, *see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980). But, sad to say, his view is not shared by a majority of the Court which has acknowledged only a theoretical limitation on the scope of congressional delegations to the executive branch. *See Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to

survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

To be sure, the plurality in the *Benzene* case ostensibly relied on the doctrine to support its interpretation of the Occupational Safety and Health Act. *See Benzene*, 448 U.S. at 645-46. But a careful reading of the plurality opinion (not, of course, an opinion of the Court, which would bind us) reveals that the doctrine was only a makeweight, tossed into the analysis, in light of Justice Rehnquist's concurrence, to help justify the result. The plurality, disturbed at the seemingly draconian impact of the Secretary of Labor's standard as applied to several industries, analytically conflated the scope of the Secretary's discretion—the legitimate concern of the nondelegation doctrine—with the regulatory consequences of his interpretation of the statute. *Id.* at 645. The latter concern is not really germane to the doctrine; indeed, the Secretary was actually claiming he had *less* discretion than the plurality thought he had. Accordingly, the *Benzene* plurality opinion gives only lip service to the nondelegation doctrine; the boundaries limiting the scope of congressional delegation to the executive branch remain only dimly perceivable. I agree with Judge Tatel that the terminology of this section of the Clean Air Act does not come so close to those boundaries to raise a serious constitutional problem.

If it did, and we were faced with two conflicting interpretations of the statute—both plausible—I have no doubt that a constitutionally dubious agency interpretation could be rejected even in a post-*Chevron* era. The majority questions that proposition—and confuses the issue—by stating that "the approach of the *Benzene*

case . . . has given way to the approach of *Chevron*." Slip Op. on Reh'g at 8. The Supreme Court's opinion in *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), is to the contrary. *See also infra* at 16 (Tatel, J., dissenting from denial of rehearing *en banc*) (citing *Mistretta*, 488 U.S. at 373 n.7). In other words, the constitutional avoidance canon trumps *Chevron* deference. But that principle is not relevant to this case. Even assuming the statute was problematic, the panel was not faced with two competing constructions, one of which might be thought to avoid constitutional difficulty. Indeed, the panel concluded that there are no intelligible principles "apparent from the statute" that brought EPA's discretion within constitutionally acceptable limits. *ATA*, 175 F.3d at 1034. If the panel believed that was so, it should have held the statute unconstitutional. Instead the panel, purporting to rely on *Chevron*, remanded to EPA directing that agency to come up with an artificially narrow interpretation with various suggestions offered by the panel to accomplish that end.[1] *Id.* at 1038-40. By so doing, I believe the panel undermines the purpose of the nondelegation doctrine.

That purpose is, of course, to ensure that *Congress* makes the crucial policy choices that are carried into law. The ability to make those policy choices (even if only at a broad level of generality) is what is meant by legislative power. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). It hardly serves—indeed, it contravenes—that purpose to demand that

[1] Like the plurality opinion in *Benzene*, these suggestions seem more directed to encouraging wiser policy choices than interpreting the statute at issue.

EPA in effect draft a different, narrower version of the Clean Air Act.[2] Under that view Congress would be able to delegate almost limitless policymaking authority to an agency, so long as the *agency* provides and consistently applies an "intelligible principle."[3]

That is not to say that EPA is totally free to exercise its authority at any point on the discretionary continuum that Congress delegated to it in the Clean Air Act. The Administrative Procedure Act's arbitrary and capricious standard also limits the agency's actions. As we have observed, the broader the substantive statutory delegation the more likely that the agency's policy choices will be confined by the APA, rather than the substantive statute. *See National Ass'n of Regulatory Utility Com'rs v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994) ("Whether an agency action is to be judged as reasonable, in accordance with the APA's general arbitrary and capricious standard, or whether it is to be examined as a permissible interpretation of the statute *vel non* depends, at least theoretically, on the scope of the

[2] The panel acknowledges this purpose but, relying on an old district court opinion as primary support, claims that its approach preserves two other rationales of the doctrine, limiting the ability of agencies to exercise delegated authority arbitrarily and providing meaningful standards for judicial review. *See ATA*, 175 F.3d at 1038 (citing *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971). But these "purposes" are obviously derivative of the doctrine's primary function of ensuring that *Congress* makes key policy decisions. It is, after all, only this so-called "third" purpose, *see id.*, that has any connection to the doctrine's constitutional source.

[3] It is true that we used a similar approach in *Industrial Union, UAW v. OSHA ("Lockout-Tagout I")*, 938 F.2d 1310 (D.C. Cir. 1991). Although one could distinguish that case, I think it rests on a similarly flawed analysis of the doctrine.

specific congressional delegation implicated."). In that regard, I am quite uncertain whether EPA's regulatory choice meets that test. Judge Tatel's emphasis on the agency's extensive procedures does not appear to me to answer the question. It would not matter whether the agency "actually adhered to a disciplined decision-making process," *ATA*, 175 F.3d at 1059, if its final product was unreasonable. If we were to rehear the case, I would focus on that issue.

Doctrine aside, then, what is the practical difference between my approach and the panel's? The answer, I think, is that the panel engages—and by retaining jurisdiction promises to continue to engage, *see id.* at 1057—in a more searching review than the arbitrary and capricious standard would permit. By treating this case as a statutory interpretation question laden with constitutional implications the panel implicitly asserts a greater role for a reviewing court than is justified.

* * * *

I respectfully dissent from our denial of rehearing *en banc*.

TATEL, Circuit Judge, with whom HARRY T. EDWARDS, Chief Judge, and GARLAND, Circuit Judge, join, dissenting from the denial of rehearing en banc:

In explaining why they remain convinced that the Clean Air Act contains an unconstitutional delegation of legislative power, my colleagues merely repeat that EPA has failed to articulate a sufficiently limiting principle. *See* Slip Op. on Reh'g at 6-7. They then launch into a discussion of the proper remedy once a court encounters a problematic legislative delegation and conclude that "the approach of the Ben*zene* case . . . has given way to the approach of *Chevron*." Slip Op. on Reh'g at 8. *But see supra* at 14-15 (Silberman, J., dissenting from the denial of rehearing *en banc*); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional. *See, e.g.*, [the *Benzene* case.]").

The issues discussed by my colleagues have no relevance to the constitutional question we face. As I pointed out in my dissent, the Clean Air Act's requirement that EPA set air quality standards "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "accurately reflect the latest scientific knowledge" is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years. 42 U.S.C. § 7409(b)(1), § 7408(a)(2). *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to the FCC to regulate

broadcast licensing in the "public interest"); *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) Tatel, J., dissenting in part) (collecting cases). In language particularly relevant to the highly technical and scientific process of setting national ambient air quality standards, the Supreme Court in *Mistretta* said this about the nondelegation doctrine: "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372. Such extensive and unambiguous Supreme Court precedent is more than enough to sustain the Clean Air Act's delegation of authority to the EPA. For purposes of constitutional analysis, we thus have no need to require that EPA state "a far more determinate basis for decision" beyond the intelligible principle Congress provided in the Clean Air Act. *ATA*, 175 F.3d at 1037. Nor have we any reason to consider what remedies might be available were we faced with a statute that failed to meet constitutional standards. Unless petitioners can persuade the Supreme Court to return to the days of *Schechter Poultry*, this "inferior" court has no authority to demand anything more from either EPA or Congress.

Neither *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), nor the *Benzene* case, both heavily relied upon by petitioners in their opposition to the suggestion for rehearing *en banc*, supports the panel's opinion. No one in *American Lung* doubted the constitutionality of section 109's directive that EPA establish NAAQS "requisite to protect the public health." Applying the familiar arbitrary and capricious standard, we held only that the Agency, in setting the sulfur dioxide NAAQS, had failed adequately to explain its application of section 109. *See American Lung*, 134 F.3d at 392. The *Benzene* plurality stated nothing more than that section 3(8) of the OSHA statute implicitly requires the Agency to make a threshold finding that a substance to be regulated causes "significant risks of harm." 448 U.S. at 641. In support of this inference, the plurality pointed to the statute's structure, context, and legislative history, *see id.* at 642-45, adding that a broader reading "might" amount to an unconstitutional delegation, *id.* at 646. The conclusion that Congress *may* constitutionally delegate authority to OSHA to regulate "significant" risks of harm hardly supports the panel's holding that Congress *may not* constitutionally delegate authority to EPA to issue NAAQS "requisite" to protect the public health—a standard more restrictive than the one the Supreme Court derived and approved in the *Benzene* case.

The panel's nondelegation holding plainly "involves a question of exceptional importance" warranting *en banc* review. Fed. R. App. P. 35(a). Not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people. *See* H.R. Rep. No. 101-490, pt. 1, at 144-45 (1990).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Nos. 97-1440, 97-1546, 97-1548, 97-1551 to 97-1553,
97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567,
97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579,
97-1582,97-1585 to 97-1588, 97-1592,
97-1594, 97-1596 to 97-1598

97-1441

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, RESPONDENT

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
INTERVENORS

Nos. 97-1441, 97-1502, 97-1505, 97-1508 to 97-1510,
97-1512 to 97-1514, 97-1518, 97-1519, 97-1526, 97-1531,
97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575,
97-1584, 97-1589, 97-1591, 97-1595, 97-1619

On Respondent EPA's Suggestion for Rehearing
En Banc

[Filed October 29, 1999]

BEFORE: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges.

Circuit Judges WALD and KAREN LECRAFT HENDERSON did not participate in this matter.

ORDER

PER CURIAM

Upon consideration of the petitions for rehearing en banc of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizens for Balanced Transportation, et al. in No. 97-1440 and the American Lung Association in Nos. 97-1440 and 97-1441, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

APPENDIX C

The final rule revising the National Ambient Air Quality Standards for Particulate Matter provides:

Therefore, 40 CFR Chapter I is amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

* * *

4. Section 50.7 is added to read as follows:

§ 50.7 National primary and secondary ambient air quality standards for particulate matter.

(a) The national primary and secondary ambient air quality standards for particulate matter are:

(1) 15.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 65 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as $PM_{2.5}$ (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(i) A reference method based on Appendix L of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(2) 50 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 150 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as

PM_{10} (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by either:

(i) A reference method based on Appendix M of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary $PM_{2.5}$ standards are met when the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 15.0 micrograms per cubic meter.

(c) The 24-hour primary and secondary $PM_{2.5}$ standards are met when the 98th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 65 micrograms per cubic meter.

(d) The annual primary and secondary PM_{10} standards are met when the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 50 micrograms per cubic meter.

(e) The 24-hour primary and secondary PM_{10} standards are met when the 99th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 150 micrograms per cubic meter.

* * *

62 Fed. Reg. 38,711 (July 18, 1997).

APPENDIX D

The final rule revising the National Ambient Air Quality Standards for Ozone provides:

Therefore, for the reasons set forth in the preamble, title 40, chapter I, part 50 of the Code of Federal Regulations is amended as follows:

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

* * *

3. Section 50.10 is added to read as follows:

§ 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 8-hour primary and secondary ambient air quality standards for ozone, measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.08 parts per million (ppm), daily maximum 8-hour average.

(b) The 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with Appendix I to this part.

* * *

62 Fed. Reg. 38,894 (July 18, 1997).

APPENDIX E

Section 107(d) of the Clean Air Act provides:

§ 7407. Air quality control regions

* * * * *

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or

secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

* * * * *

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15, 1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for

such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

* * * * *

(3) Redesignation

* * * * *

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

* * * * *

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not

submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

* * * * *

Section 108(a) of the Clean Air Act provides:

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * * * *

Section 109 of the Clean Air Act, 42 U.S.C. 7408, provides:

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

* * * * *

(b) Protection of public health and welfare

(1) National pri ary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

* * * * *

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State Air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under

section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

* * * * *

Section 172 of the Clean Air Act, 42 U.S.C. 7409, provides:

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In deter-

mining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates

are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

* * * * *

Section 181 of Subpart 2, Part D, Title I of the Clean Air Act provides:

Subpart 2–Additional Provisions for Ozone Nonattainment Areas

§ 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 nonattainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value [FN*]	Primary standard attainment date N**]
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above.....	20 years after November 15, 1990

[FN*] The design value is measured in parts per million (ppm).

[FN**] The primary standard attainment date is measured from November 15, 1990.

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1)(Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if—

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with

table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

* * * * *

Section 307 of the Clean Air Act, 42 U.S.C. 7607, provides:

§ 7607. Administrative proceedings and judicial review

* * * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, * * * or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title * * * or any other final action of the Administrator under this chapter (including any denial or disapproval by the

Administrator under subchpater I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

* * * * *

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed

rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would

have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

* * * * *

Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

(3)

No. 99-1257

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO PETITION FOR A WRIT OF CERTIORARI

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for American Lung Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2 cp

RESPONSE OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI BY THE SOLICITOR GENERAL

Respondent American Lung Association (ALA) supports the petition of the Solicitor General for a writ of certiorari to review the court of appeals' rulings concerning both the nondelegation doctrine and the implementation of the new eight-hour national ambient air quality standards for ozone. Indeed, ALA has filed its own petition for certiorari concerning those two rulings. *American Lung Assn. v. American Trucking Assns.*, No. 99-1265.

ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

DATED: February 16, 2000.

Respectfully submitted,

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for American Lung Association

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

(4) (3) (2)

Nos. 99-1257, 99-1263, 99-1266

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR THE RESPONDENTS APPALACHIAN POWER CO., *et al.*

DAVID E. MENOTTI
WILLIAM F. PEDERSEN
JEFFERY A. KNIGHT
SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8675
Counsel for American Forest & Paper Association, American Iron & Steel Institute, and Alliance of Automobile Manufacturers

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
LUCINDA MINTON LANGWORTHY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Appalachian Power Co., et al., American Public Power Association, and National Association of Home Builders

February 28, 2000

[*Additional Counsel Listed Inside*]

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

5402

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

RUSSELL S. FRYE
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
(202) 342-8878
and
RICHARD WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION, INC.
1111 19th Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 463-2582
Counsel for American Forest & Paper Association, Inc.

GRANT CRANDALL
General Counsel
UNITED MINE WORKERS OF AMERICA, AFL-CIO
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7200
and
EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
(304) 258-1977
Counsel for United Mine Workers of America, AFL-CIO

DAVID F. ZOLL
ALEXANDRA DAPOLITO DUNN
CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5165
Counsel for Chemical Manufacturers Association

G. WILLIAM FRICK
M. ELIZABETH COX
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8250
Counsel for American Petroleum Institute

HAROLD P. QUINN, JR.
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-9793
Counsel for National Mining Association

JULIE BECKER
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5500
Counsel for Alliance of Automobile Manufacturers

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Wasshington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

DAVID M. FLANNERY
JACKSON & KELLY
P.O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group; and West Virginia Chamber of Commerce

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Company

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act which resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation under "Subpart 1" of the Clean Air Act.

3. Whether this Court should grant certiorari to review the D.C. Circuit's unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of ozone NAAQS.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Respondents are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Appalachian Power Co., *et al.* is comprised of the following:
Baltimore Gas and Electric Company
Carolina Power & Light Company
Central and South West Services, Inc.
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Illinois Public Service Company
CINergy Corp.
Columbus Southern Power Company
Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)

Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company,
dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation
dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission

Cooperative, Inc.
Potomac Edison Company, The
dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)
Nevada Mining Association
Newmont Gold Co.

Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this brief in response, but have not joined CAA Industry Respondents in filing this brief in response.

American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Judy's Bakery, Inc.
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
David Matusow
Brian McCarthy
National Association of Manufacturers

National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
National Stone Association
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Petitioner United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this brief in response.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this brief in response.

Representative Tom Bliley

Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Respondents hereby discloses the parent companies of respondents and any publicly held companies that own 10% or more of respondents' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)
Georgia Power Company

(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)
South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest

Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co. (a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Respondents have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these respondents.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv
Detroit Edison Co.
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.

Jacksonville Electric Authority
Kansas City Power & Light Co.
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Minnesota Power
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
Nevada Mining Association
Newmont Gold Co
Oglethorpe Power Corp.
Ohio Valley Elec. Corp.
Ottertail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation
dba PPL Utilities
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 DISCLOSURE STATEMENT	viii
TABLE OF AUTHORITIES	xv
STATEMENT OF THE CASE	2
REASONS FOR REJECTING THE "NON-DELEGATION" QUESTION PRESENTED BY EPA AND FOR DENYING THE PETITIONS FOR CERTIORARI ON THE SUBPART 2 HOLDING.....	10
I. THE "NONDELEGATION" QUESTION PRESENTED BY EPA, ALA AND STATE PETITIONERS DOES NOT WARRANT REVIEW	10
A. The Question Presented by EPA and Other Petitioners Presents No Conflict With Supreme Court Precedent or With Any Important Principle of Law.....	11
B. If Certiorari Is Granted, It Should Be Granted to Address the Scope of EPA's Authority on Remand To Define an Intelligible Principle	19

II. THE COURT OF APPEALS' "SUBPART 2" HOLDING DOES NOT WARRANT CERTIORARI 20

A. The Government's Belated Finality and Ripeness Arguments Present Neither A Conflict of Law Nor an Issue of Importance 21

B. EPA's Arguments on the Merits, Which Have Been Rejected by the Panel and by the Court of Appeals *En Banc*, Provide No Basis for Certiorari 25

C. The Interlocutory Nature of the Lower Court's Decision Counsels Against Granting Certiorari on the Subpart 2 Questions Presented by EPA 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) 16

ALA Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 16

Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1980) 16

Alabama Power Co. v. EPA, 40 F.3d 450 (D.C. Cir. 1994) 16

American Lung Association v. EPA, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999) 17

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 15

American Trucking Associations, Inc. v. EPA,175 F.3d 1027, *modified*, 195 F.3d 4 (1999) ..... *passim*

AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999) 16

Bennett v. Spear, 520 U.S. 154 (1997) 24

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ... 9,13,14

Dow Chemical v. United States Environmental Protection Agency, 823 F.2d 319 (5th Cir. 1987) 24

Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995) 16

Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 15

H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) .. 16

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 15,16
International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991)..... 16
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 14,16
Kent v. Dulles, 357 U.S. 116 (1958)..... 16
Lead Industries Ass'n v. EPA, 647 F.2d 1130(D.C. Cir. 1980)..... 19
Loving v. United States, 517 U.S. 748 (1996)... 16,17
Mistretta v. United States, 488 U.S. 361 (1989) 14,16
National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974)..... 16
Natural Resources Defense Council, Inc., v. EPA, 824 F.2d 1146 (D.C. Cir. 1987)..... 19,20
Natural Resources Defense Council, Inc. v. EPA, 902 F.2d 962 (D.C. Cir. 1990)..... 17
Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726 (1998)..... 24
Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985)... 15
SEC v. Chenery, 332 U.S. 194 (1947)..... 15
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 15
Stelos Co. v. Hosiery Motor-Mend Corp., 295 U.S. 237 (1935)..... 20
Touby v. United States, 500 U.S. 160 (1991).... 14
United States v. Henry, 136 F.3d 12 (1st Cir. 1998)..... 15
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)..... 12
Zemel v. Rusk, 381 U.S. 1 (1965)..... 16

STATUTES

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (1994 & Supp. III 1997)
CAA, Title I, Part D, Subpart 2, §§ 181-185B, 42 U.S.C. §§ 7511-7511f 2,6
CAA § 101, 42 U.S.C. § 7401 11
CAA § 107(d), 42 U.S.C. § 7407(d)..... 7,21,26
CAA § 107(d)(1), 42 U.S.C. § 7407(d)(1) 26
CAA § 107(d)(4), 42 U.S.C. § 7407(d)(4) 26
CAA § 108, 42 U.S.C. § 7408..... 2
CAA § 108(a), 42 U.S.C. § 7408(a)..... 2
CAA § 109, 42 U.S.C. § 7409..... *passim*
CAA § 109(b), 42 U.S.C. § 7409(b)..... 2,11
CAA § 109(d), 42 U.S.C. § 7409(d)..... 2,11,19,29
CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2) 3
CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C) 25
CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D) 25
CAA § 172(b), 42 U.S.C. § 7502(b)..... 26
CAA § 172(c), 42 U.S.C. § 7502(c)..... 26
CAA § 181, 42 U.S.C. § 7511..... 26
CAA § 181(a), 42 U.S.C. § 7511(a)..... 7,21,25,26
CAA § 181(b)(1), 42 U.S.C. § 7511(b)(1) 7,26
CAA §§ 182-185A, 42 U.S.C. §§ 7511a-7511e 28
CAA § 184(b), 42 U.S.C. § 7511c(b)..... 7
CAA § 307(b), 42 U.S.C. § 7607(b)..... 24
CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) 13

The Transportation Equity Act for the 21st Century § 6101, Pub. L. 105-178, 112 Stat. 463 (1990) 4

REGULATIONS

40 C.F.R. § 50.9(b)..... 8,9,23,24

FEDERAL REGISTER

62 Fed. Reg. 38,421-32 (1997)..... 4
62 Fed. Reg. 38,651-701 (1997)..... 4,5,6
62 Fed. Reg. 38,855-96 (1997)..... 4,5,6,8,23
63 Fed. Reg. 31,014-96 (1998)..... 8
63 Fed. Reg. 39,431-37 (1998)..... 8
64 Fed. Reg. 30,911-17 (1999)..... 8

LEGISLATIVE HISTORY

H.R. Rep. No. 101-490, Pt. 1 (1990), *reprinted in* Sen. Comm. on Env. And Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print, 1993).. 7,28
Sen. Comm. on Env. and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, 1236-37 (Comm. Print, 1993) (H.R. Debate Oct. 26, 1990, Statement of Rep. Fields)..... 7

MISCELLANEOUS

Sup. Ct. R. 10..... 11,25
Craig Oren, "Run Over by American Trucking Part I: Can EPA Revive its Air Quality Standards?", 29 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,653 (Nov. 1999)..... 12

R. Lutter and C. Wolz, "UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard" 31 *Env'tl Sci. Tech. News* 142-146 (1997).... 29
Statement of the Hon. John H. Chafee, Chairman, Senate Environment Committee, Hearings on Clean Air Act (May 20, 1999).. 17

BRIEF IN RESPONSE TO PETITIONS FOR CERTIORARI

On May 14, 1999, the United States Court of Appeals for the District of Columbia Circuit remanded to the United States Environmental Protection Agency ("EPA" or "the Agency") the Agency's revised National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM"). EPA has petitioned for a writ of certiorari (No. 99-1257) on parts of that decision, as confirmed and clarified upon rehearing on October 29, 1999. The American Lung Association ("ALA") (No. 99-1265) and the states of Massachusetts and New Jersey ("State Petitioners") (No. 99-1263) have filed petitions seeking review of the same issues. This response is being filed on behalf of trade associations representing most of the major industries in this country, including the utility industry, automobile industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations (hereinafter referred to as "CAA Industry Respondents"). These companies and organizations are listed on the cover to this brief.

This Court should deny these petitions as to the lower court's holding on Subpart 2 to Part D of Title I of the Clean Air Act ("CAA"). As to the questions Petitioners present regarding the "nondelegation" holding, if certiorari is granted, it must encompass review of the lower court's

decision limiting the factors that may be considered by EPA on remand in developing an "intelligible principle."[1]

STATEMENT OF THE CASE

1. *The NAAQS Program* – Section 108(a), EPA App. 109a-110a, provides for regulation of an ambient air pollutant that "endangers" public health. Under §§ 108 and 109 of the Act, EPA App. 109a-113a, NAAQS are to be based on a "criteria document," that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare" associated with the presence of a pollutant in the ambient air. Under § 109(b), State App. 102, "primary" NAAQS are set at a level that, allowing an "adequate margin of safety," is "requisite to protect the public health." Secondary standards are set at a level that is "requisite to protect the public welfare from known or anticipated adverse effects." Under § 109(d), State App. 102, NAAQS may be revised periodically "as may be appropriate" in accordance with § 108 and § 109(b).

2. *The EPA Rulemaking* – In the case below, CAA Industry Respondents challenged EPA's decision to establish new "public health" policy under § 108 and § 109 of the Clean Air Act as reflected in its decision (1) to revise the existing NAAQS for ozone and PM, and (2) to replace the ozone reduction program enacted by Congress in 1990 based on the 1-hour NAAQS (the "Subpart 2" program, CAA Industry Cross-Petitioners App. ("ICP App.") 2a-62a) with a

[1] Out of an excess of caution, a Conditional Cross-Petition for Certiorari addressing this issue is being filed today. The companies and organizations joining in that Cross-Petition ("CAA Industry Cross-Petitioners") are listed on the cover of that petition.

different program to be developed by EPA under the general planning requirements of Subpart 1 of the Act and based on a new 8-hour ozone NAAQS.

While EPA and other petitioners claim these standards are needed to address serious health risks, the record below presents a very different picture. With respect to the ozone NAAQS, EPA's independent science advisers (the Clean Air Scientific Advisory Committee or "CASAC")[2] concluded, based on their extensive review of the science, that none of the ozone levels that were considered for the revised NAAQS (including the existing ozone NAAQS) could be distinguished as significantly more protective of public health than the others.[3] EPA's staff similarly observed that a standard equivalent to the existing 1-hour NAAQS "would reduce estimated exposure of the at-risk population sufficiently to provide some margin of safety."[4]

As for PM, the same independent science advisers could form *no* consensus on the level, averaging time or form of a revised PM NAAQS because of many uncertainties regarding the existence and nature of any causal relationship between public health, on the one hand, and the fine particle indicator

[2] CASAC is the independent body created by Congress to provide scientific advice to EPA on NAAQS decisions. *See* CAA § 109(d)(2), EPA App. 112a.

[3] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236, ("[T]he Panel concluded that there is no 'bright' which distinguishes any of the proposed standards . . . as being significantly more protective of public health.").

[4] EPA, Review of the National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information 167 (1996) ("Staff Paper"), Ozone JA 1790.

("$PM_{2.5}$") chosen for the revised NAAQS, on the other.[5] Given these uncertainties and the lack of air quality data for $PM_{2.5}$, the Administration delayed implementation of the $PM_{2.5}$ NAAQS until at least 2002 so that the revised standard could be reevaluated.[6]

The uncertain science regarding possible health effects associated with exposure to extremely low ambient concentrations of these substances,[7] coupled with EPA's assumption that there is no threshold for effects for these substances, made it impossible to distinguish among the range of alternative standard levels based on public health protection alone.[8] EPA's decisions to revise these NAAQS

[5] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (June 13, 1996), PMJA 3167 ("The diversity of opinion . . . reflects the many unanswered questions and uncertainties associated with establishing causality of the association between $PM_{2.5}$ and mortality."); *see also* 62 Fed. Reg. 38,689 n.90 (suggesting a lack of direct evidence of a relationship between long-term $PM_{2.5}$ exposure and health effects).

[6] The President, Memorandum of July 16, 1997, "Implementation of Revised Air Quality Standards for Ozone and Particulate Matter," 62 Fed. Reg. 38,421 (1997), ICP App. 72a. This decision was codified by Congress. *See* Transportation Equity Act for the 21st Century § 6101, Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a.

[7] In the case of ozone, for example, EPA's science advisers observed that the revised standard would regulate concentrations approaching background levels. CASAC Tr. (March 22, 1995) at 296, Ozone JA 278; Comments by George T. Wolff (March 27, 1995), at 4, Ozone JA 383; Staff Paper at 20, Ozone JA 1830.

[8] *See, e.g.*, 62 Fed. Reg. 38,883 (ozone); 62 Fed. Reg. 38,688 (PM) (the Administrator's margin of safety determinations "are largely judgmental in nature, particularly with respect to nonthreshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric.").

therefore were driven not by science, but by the Administrator's policy judgment, unbounded by any intelligible principle, as to how much protection is "sufficient[]" in light of "[u]ncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified."[9] Furthermore, these policy judgments were exercised against a background of declining pollutant concentrations due to CAA programs already in place.[10]

In exercising this policy judgment, EPA explained at length factors that it asserted were *not* relevant to its decision[11] and then identified several health-related factors that it did consider.[12] EPA wholly failed, however, to articulate any principle that would guide the exercise of its discretion in

[9] 62 Fed. Reg., 38,857, (ozone); 62 Fed. Reg. 38,653 (PM).

[10] *See, e.g.*, EPA, *National Air Quality and Emissions Trends Report, 1995* at 1, 61 (1996), PMJA 4152-53 (ambient PM_{10} concentrations decreased by 22 percent between 1988 and 1995 and the number of areas designated nonattainment for ozone decreased by 30% between 1990 and 1996).

[11] These factors included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards. 62 Fed. Reg. 38,878-83, 38,884-85 (ozone); 62 Fed Reg. 38,683-89 (PM); *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), Ozone JA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July, 1997), PMJA 312.

[12] The factors that EPA did consider included the magnitude and severity of health effects, uncertainty in the data, and the size of the sensitive population. EPA Pet. 15 n.9, EPA App. 7a.

choosing, based on these health-related factors, from among air quality levels that could not be distinguished from a public health protection standpoint. It simply asserted that where there is scientific uncertainty, the courts must defer to the Administrator's "reasoned" judgment even if the Agency articulates no principle for assessing whether the resulting standard is reasonable.[13]

As a result, the revised NAAQS reflected EPA's interpretation of § 109 to provide no intelligible criteria to guide the Administrator's risk management decisions. Following this theory, the Administrator's discretion in choosing among health protective alternatives was unconstrained, for example, by EPA's own analyses showing that the costs to society of the revised ozone NAAQS would significantly outweigh its benefits.[14]

Finally, as a result of the failure of the pre-1990 Clean Air Act program to reduce ozone under the general planning authority of Subpart 1 of Part D, Title I of the Act, Congress in 1990 enacted a detailed statutory program as Subpart 2 to Part D. This new statutory ozone reduction program was based on the existing 1-hour NAAQS and reflected Congress' judgment that addressing the public health risks associated with low-level ozone exposures does not require inflexible attainment deadlines or massive economic or social

[13] *See, e.g.*, 62 Fed. Reg. 38,883, (ozone); 62 Fed. Reg. 38,688 (PM).

[14] *See* EPA, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17, ES-20 (July 16, 1997), Ozone JA 2919, 2924, 2927 ("RIA"). In the case of the revised PM NAAQS, EPA estimated the cost of attainment at $37 billion annually. *Id.* at 9-1, Ozone JA 2934.

dislocation – aspects of the pre-1990 Subpart 1 ozone reduction program that made that program unworkable.[15]

The statutory Subpart 2 program includes specific strategies and timetables, based on the existing 1-hour ozone NAAQS, for reducing ground-level ozone concentrations. It applies to both nonattainment and attainment areas.[16] And it explains how to regulate areas that are now in attainment but that may have deteriorating air quality and become nonattainment areas in the future.[17]

To avoid any confusion about how ozone reductions were to be achieved under the Clean Air Act, Congress provided in § 181(a) of Subpart 2 that "each area designated nonattainment for ozone pursuant to § 107(d)" – a provision that governs designation of *all* existing and future ozone nonattainment areas as a prerequisite for regulating that area under the Act – "shall be classified at the time of such designation, under table 1, *by operation of law*" and then regulated according to its Subpart 2 classification. CAA § 181(a), EPA App. 117a (emphasis added). In this way Congress blocked EPA from initiating an alternative ozone reduction program under Subpart 1 based on a more stringent ozone NAAQS.

[15] *See* 1 Sen. Comm. on Env. & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, 1236-37 (Comm. Print, 1993) ("1990 Legis. Hist."), (H.R. Debate Oct. 26, 1990, statement of Rep. Fields); H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. at 3169-72, 3253-82.

[16] *See, e.g.*, CAA § 184(b), ICP App. 55a-56a (requiring specific implementation measures in attainment areas of states within an ozone transport region).

[17] *See* CAA § 181(b)(1), EPA App. 119a-120a.

Despite this clear statutory language, EPA in its final rule revising the ozone NAAQS promulgated a provision (40 C.F.R. § 50.9(b), State App. 113) authorizing EPA to revoke the congressional Subpart 2 program for areas that have air quality meeting the 1-hour NAAQS. The provision requires EPA to replace the Subpart 2, 1-hour NAAQS-based regulatory program in these areas with a program that EPA would develop for the revised 8-hour NAAQS under the general planning requirements of Subpart 1,[18] the approach Congress *rejected* in adopting Subpart 2. Pursuant to that provision, EPA subsequently revoked the 1-hour NAAQS and Subpart 2 program in a number of areas.[19]

3. *The Lower Court's Opinion* -- Because of the various flaws in EPA's reasoning summarized above, on May 14, 1999, a panel of the D.C. Circuit remanded the revised NAAQS for ozone and PM to EPA. First, after a thorough review of the record, the panel concluded that, because the Administrator's interpretation of § 109 failed to provide *any* intelligible principle for exercising public health policy judgment in response to uncertain and inconclusive science (i.e., because her interpretation of § 109 "[f]ail[ed] to state intelligibly how much [risk] is too much"), the Administrator's interpretation would render this provision an unconstitutional delegation of authority. EPA App. 5a-6a. The court did *not* hold the statute itself unconstitutional but rather remanded the NAAQS for EPA to exercise the discretion delegated to it by Congress to interpret § 109 in a

[18] 62 Fed. Reg. 38,873, ICP App. 74a-75a.

[19] *See, e.g.*, 64 Fed. Reg. 30,911 (1999); 63 Fed. Reg. 31,014 (1998); 63 Fed. Reg. 39,432 (1998).

way that provides intelligible criteria for implementing it. EPA App. 14a.

Second, the court rejected EPA's interpretation of the CAA as prohibiting consideration of the protective effect of ozone in the ambient air with respect to ultraviolet B ("UVB") radiation when it establishes an ozone NAAQS. According to the court, "it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects."[20] EPA does not seek review of this part of the lower court's decision.

Third, the panel rejected EPA's legal conclusion, embodied in § 50.9(b) of the rule, State App. 113, that EPA had authority to rewrite the congressional ozone reduction program. The court relied on the plain language of the statute directing that the congressional Subpart 2 program apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the CAA – explicit language that the court found dispositive under the first prong of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA App. 38a. On this basis, the court held that EPA could enforce a revised ozone NAAQS only "under Subpart 2," EPA App. 43a, and that the Agency was precluded "from requiring areas to comply either more quickly *or with a more stringent NAAQS*." EPA App. 40a (emphasis added).[21]

[20] EPA App. 47a. Respondents also raised the public health disbenefits issue as to the revised PM NAAQS and EPA rejected those comments on the same grounds that it relied upon in refusing to consider the issue in the ozone rulemaking.

[21] In another part of its opinion that has gone unchallenged, the panel vacated the revised coarse PM standards. EPA App. 53a, 57a-58a.

On October 29, 1999, the D.C. Circuit panel rejected EPA's petition for rehearing, except for minor editing which, *inter alia*, clarified and confirmed that portion of the panel's decision concerning the role of Subpart 2 in implementation of any revised primary ozone NAAQS.[22] The D.C. Circuit then *unanimously* rejected EPA's *en banc* petition on the public health disbenefits and Subpart 2 issues of statutory construction, both of which were independent grounds for remanding the revised ozone standard.[23]

EPA's petition for certiorari followed.

REASONS FOR REJECTING THE "NON-DELEGATION" QUESTION PRESENTED BY EPA AND FOR DENYING THE PETITIONS FOR CERTIORARI ON THE SUBPART 2 HOLDING

I. THE "NONDELEGATION" QUESTION PRESENTED BY EPA, ALA AND STATE PETITIONERS DOES NOT WARRANT REVIEW.

After careful review of a complex record, the court below concluded that EPA had not applied any "intelligible principle" in deciding whether and how to revise the ozone and PM NAAQS. It therefore remanded the cases to allow EPA to identify such a principle.

While the D.C. Circuit correctly held that EPA's interpretation of the Act requires remand to develop an "intelligible principle" to manage risk, EPA App. 14a, it

---

[22] EPA App. 70a-82a.

[23] Those judges who dissented from the court's denial of rehearing *en banc* mentioned only the nondelegation issue. *See* EPA App. 91a-99a.

erred in precluding EPA from considering other burdens on society, including the economic and indirect public health consequences of NAAQS decisions, as part of the "intelligible principles" for risk management decisions under § 109. EPA App. 19a-22a. As explained in the Conditional Cross-Petition also being filed in this case, the "adequate margin of safety" language in § 109(b), EPA App. 111a, the "as may be appropriate" language in § 109(d), EPA App. 112a, and the "purposes" section of the Act, ICP App. 1a, permit the Agency to consider the broad economic and social consequences of CAA § 109 risk management decisions.

As a result, although CAA Industry Respondents disagree that the nondelegation question presented by the Government and others makes this case worthy of review by this Court, they believe that if this Court reviews the "nondelegation" holding of the lower court, it must review the scope of EPA's discretion to manage risk under § 109 of the Act.

A. The Question Presented by EPA and Other Petitioners Presents No Conflict With Supreme Court Precedent or With Any Important Principle of Law.

To read the question presented and the arguments of the Government and other petitioners, one would think that the D.C. Circuit had struck down an act of Congress and held that Congress may no longer legislate in broad terms. But that is not what the court of appeals did. All it did was to hold that *EPA's construction* of a statute is inadequate until EPA reveals its principle of decision, and then it remanded the rules to EPA to articulate such a principle. EPA App. 5a, 14a. This by itself is unexceptional, and no "compelling reason[]" for Supreme Court review. Sup. Ct. R. 10.

Indeed, the court could not have done less, faced with EPA's radical view of its own authority. EPA argues that to issue a legally valid decision it need only consider factors it deems relevant. This, EPA explains, is satisfied merely by EPA's discussion of relevant evidence in the *Federal Register*. EPA Pet. 13-14. After that, all is "judgment." In other words, EPA can decide whatever it wants, so long as it has examined an appropriate set of data. Just as the National Environmental Policy Act is "essentially procedural,"[24] EPA hopes to make its own rulemaking obligation under § 109 of the Clean Air Act "essentially procedural."

This is EPA's position, but it is not the law of agency rulemaking and never has been. EPA's view of its role imposes no *substantive* standard on agency rulemaking at all, only the *procedural* requirement that relevant evidence be considered in a decisional vacuum. As this novel theory suggests, agency "judgment" becomes a mysterious process that cannot ultimately be explained but must issue oracle-like from the agency's mouth. "Pay no attention to that man behind the curtain," says the Agency; "I have considered the relevant evidence."

We repeat: All the court required here was that the agency explain its reasoning. Some have argued that the constitutional "nondelegation" rationale for remand in this case might as well have been articulated as "arbitrary and capricious" agency action[25] – that EPA failed to state a

[24] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[25] Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,653, 10,658 (Nov. 1999).

rational basis for its decision.[26] Whatever the rationale, the proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review.

In support of its petition, EPA observes that "Congress does not violate the constitution 'merely because it legislates in broad terms.'" EPA Pet. 12. But from this uncontroversial principle, EPA goes on to argue that because Congress wrote § 109 in broad terms, EPA actions implementing § 109 must be upheld – even if EPA interprets § 109 to provide no criteria to guide its discretion. EPA Pet. 11-12. According to EPA, to rule otherwise would be a "striking departure from this Court's nondelegation jurisprudence." EPA Pet. 11.

Not at all. In an attempt to manufacture a basis for certiorari, EPA attacks a strawman. The lower court did *not* question Congress' authority to legislate in broad terms, and neither do we. Nor did the court hold that § 109 is unconstitutional. Rather, in response to EPA's repeated and strenuous rejections of any reading of § 109 that would provide principles to guide the Agency's choice among alternative standards, the lower court found that EPA's *interpretation* of § 109 – not the statute on its face – reflects an unconstitutional delegation. The court therefore remanded the rules before it to permit the Agency to exercise the discretion given it by Congress in § 109 to interpret and to implement this broad delegation of authority.[27]

[26] *See* CAA § 307(d)(9), EPA App. 126a ("arbitrary and capricious" standard).

[27] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 865 (1984) (Where "Congress has not directly addressed

There is nothing remarkable about this. Courts have frequently required an agency to articulate the legal principles that guide its discretion when it adopts, or refuses to revise, legislative rules.[28] Indeed, we are aware of no decision, by this Court or any other, that has permitted an agency to construe its enabling statute so that no intelligible principle governs the agency's exercise of rulemaking discretion.

This Court has always demanded that agencies be guided by an intelligible principle, as even Petitioner ALA concedes.[29] *See Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court found that the agency had provided no intelligible principle for setting standards under § 6(b)(5) of the Occupational Safety and Health Act ("OSHA"). The Court nevertheless found that an intelligible principle could be discerned when this provision was read along with the definitions in the Act (OSHA § 3(8)) and

---

the precise question at issue," it is for the agency to construe the statute "within the limits of [the congressional] delegation.").

[28] *See infra* notes 33 - 35 and accompanying text.

[29] *See* ALA Pet. 18 (ALA concedes that "the precedent of this Court . . . requires . . . an 'intelligible principle'" to guide statutory implementation, but argues that the lower court in its explanation of this established principle demands too much precision from EPA).

therefore remanded the case. *Id.* at 641.[30] Curiously, EPA in its petition does not even mention *Industrial Union.* Nor does EPA discuss the other key case on which the lower court relied *(International Union, UAW v. OSHA)*[31] – a case in which the Government did not even seek certiorari.[32]

Therefore, while EPA argues that the lower court has questioned Congress' authority to legislate "in broad terms," it did nothing of the kind. It simply confirmed that when EPA acts pursuant to a broad delegation of authority, EPA's first and most critical obligation is to enunciate, under the second prong of *Chevron,* the legal standard it applies in exercising the discretion given it by Congress. Where an agency misconstrues the scope of the discretion delegated by Congress, it acts unlawfully.[33]

---

[30] Petitioner ALA's reliance on this case, *see* ALA Pet. 19, is misplaced, because this case adopts the same method of analysis as applied by the lower court in *ATA*.

[31] 938 F.2d 1310 (D.C. Cir. 1991).

[32] By contrast, petitioners cite a number of cases, including *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), *U.S. v. Henry*, 136 F.3d 12, 17 (1st Cir. 1998), and *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974), in which statutes delegating broad authority were found constitutional because the language of the statute, its purposes, its factual background and context bounded administrative discretion. Similarly, in this case, the court below did *not* find the CAA unconstitutional; it simply remanded this case for EPA to exercise the discretion delegated to it by Congress. *Cf. South Terminal Corp.* 504 F.2d at 670 (The court set aside a key provision of the rule at issue as "standardless").

[33] *See, e.g., SEC v. Chenery*, 332 U.S. 194, 196-97 (1947); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970); *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

Reflecting these established principles, judicial decisions commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[34] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts have rejected such a construction because of the "nondelegation" principle.[35] Remanding the case for EPA to develop an intelligible principle for risk management decisions is therefore fully in keeping with the law of this Court.[36]

---

[34] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1055 (D.C. Cir. 1995); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994); *Alabama Power Co. v. Costle*, 636 F.2d 323, 355 (D.C. Cir. 1980).

[35] *See, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310, 1313; *see also AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999).

[36] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *see also Loving v. United States*, 517 U.S. 748, 758

EPA should not have been surprised by this remand, for it had ample warning in the case law of the lower court. In an earlier case addressing NAAQS, the D.C. Circuit anticipated that in future cases "EPA might be required to explain the risk it considered tolerable." *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 974 (1990). Just such a case arose in *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999), resulting in a remand for EPA to explain how it determined what risk was tolerable.[37] This is not an unreasonable demand when the statute requires the Agency to explain why "public health" will be advanced by its decision.[38] Without a legal standard ("intelligible principle") to guide its exercise of discretion, judicial review – including arbitrary and capricious review – simply is not possible.[39]

(1996) ("[T]he lawmaking function belongs to Congress, . . . and may not be conveyed to another branch or entity.").

[37] 134 F.3d at 392-93 ("[U]nless [the Administrator] describes *the standard under which she has arrived at this conclusion*, supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" (emphasis added; citation omitted)).

[38] As the late Senator Chafee observed after the lower court's decision, "this is not a general defect in all of our environmental laws . . . . I agree with the Court as it expresses its discomfort with the vagueness in these two regulations." Statement of Hon. John H. Chafee, Chairman, Senate Environment Committee, Hearings on Clean Air Act (May 20, 1999).

[39] Contrary to EPA's argument, EPA Pet. 17-19, the lower court does *not* call for an unprecedented amount of precision in making NAAQS decisions. Rather, by requiring the Agency to enunciate an "intelligible principle" guiding its risk management decisions under § 109, the court is merely seeking consistency in decisionmaking, without which agency action would be arbitrary by definition.

Finally, EPA points in its petition to statutory language and legislative history which it believes could be used to derive intelligible principles for making risk management decisions under § 109. For example, EPA argues in its petition that an intelligible principle might be found, among other places, in (1) the Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," EPA Pet. 15; and (2) the legislative history's direction to consider the "public health" and not "individual health." *Id.*[40]

While EPA's suggestions represent a good starting point for developing an intelligible principle for risk management, they are only a starting point. None of the language EPA identifies itself specifies how to select among a range of uncertain health risks, or among air quality levels that cannot be distinguished from a public health protection standpoint. Rather, this is the task the lower court has directed EPA to undertake on remand, and EPA's petition suggests that the Agency knows what this task entails.

For these reasons, the "nondelegation" question presented in the petitions for certiorari reveals no conflict with any prior precedent of this Court and no important issue of law. Certiorari on this question is not appropriate.

---

[40] In its petition for rehearing to the lower court, EPA also argued that an intelligible principle might be found in the "requisite to protect" language of § 109 – namely, that this language requires a standard level no more or less stringent than "necessary" to protect public health. In its petition, EPA also advances for the first time use of a "zone of reasonableness" test. *See* EPA Pet. 18.

B. If Certiorari Is Granted, It Should Be Granted to Address the Scope of EPA's Authority on Remand To Define an Intelligible Principle.

For the reasons set out above, CAA Industry Respondents submit that the nondelegation issue raised by the Government does not offer a compelling reason for certiorari. Should this Court nevertheless grant certiorari on the need for an intelligible principle to guide § 109 risk management decisions, the Court will have to consider the scope of EPA's discretion to derive an intelligible principle from the CAA.

On this issue, the lower court was presented with arguments that neither the "margin of safety" standard-setting language of § 109 nor the "as may be appropriate" standard-revision language of § 109(d) prevents EPA from considering social or economic values or the indirect public health consequences of its decisions on NAAQS. The court of appeals emphatically rejected these arguments under "*Chevron* step one," on the ground that its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that the "'[s]tatute . . . make[s] clear that economic considerations play no part in the promulgation of [NAAQS].'" EPA App. 19a.

However, this characterization of *Lead Industries* is at odds with the lower court's later decision interpreting similar language in CAA § 112, as it then existed, requiring regulation of hazardous air pollutants to provide an "ample margin of safety." *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*). Although this language is more precautionary than the "adequate margin of safety" in CAA § 109, writing for the court, Judge Bork observed that the "margin of safety" language on its face "does *not* . . . preclude consideration of any factor," *id.*

at 1155 (emphasis added), and that *Lead Industries* and prior D.C. Circuit case law addressing § 109 does not stand for the proposition that "cost and technological feasibility can *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

If the Court decides to grant certiorari in response to the Government's nondelegation issue, we believe that the Court will necessarily have to address the scope of EPA's authority on remand to define intelligible principles for risk management decisions. Nevertheless, "out of excess of caution,"[41] CAA Industry Cross-Petitioners are filing a Conditional Cross-Petition presenting this question directly. CAA Industry Cross-Petitioners believe that this question is worthy of review and therefore would not object to a grant of certiorari to address the question as framed in the Conditional Cross-Petition.

II. THE COURT OF APPEALS' "SUBPART 2" HOLDING DOES NOT WARRANT CERTIORARI.

The petitions for certiorari also address the court of appeals holding that any revised NAAQS for ozone may be enforced only in conformity with Subpart 2 of Part D of the CAA rather than (as EPA alleges) under Subpart 1 as well. EPA App. 81a. In support of its petition, EPA first asserts that certiorari is needed to address an argument that EPA briefed for the first time in its petition for rehearing to the panel, namely, that the lower court lacked jurisdiction to review EPA's decision on this point. EPA Pet. 19-25. Alternatively,

---

[41] *See, e.g., Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935).

EPA repeats the merits arguments that were rejected by the panel in its initial decision and again on rehearing, and which did not garner a single vote for rehearing *en banc*. EPA Pet. 25-29. Neither argument has merit, and neither provides a basis for certiorari.

A. The Government's Belated Finality and Ripeness Arguments Present Neither A Conflict of Law Nor an Issue of Importance.

CAA Industry Respondents challenged EPA's final rule revising the ozone NAAQS on the ground that, because the congressional Subpart 2 program is based on the existing 1-hour NAAQS and because this program applies "by operation of law" under CAA Section 181(a), EPA App. 117a-119a, to "[e]ach area designated nonattainment for ozone" under CAA § 107(d), it was not "appropriate" to replace the 1-hour NAAQS with a new more stringent 8-hour NAAQS that addressed the same public health risks, and that could not be implemented or enforced under Subpart 2. *See* EPA App. 35a.[42]

The lower court rejected the argument that revision of the ozone NAAQS was not "appropriate" on this ground. The court nonetheless accepted Industry Respondents' underlying argument that implementing a more stringent ozone NAAQS would conflict with the Subpart 2 statutory program that Congress established as the exclusive program for

---

[42] Members of CASAC in fact recommended against an approach that would require simultaneous application of different ozone standards in different areas of the country, because of the confusion and disruption this would cause. *See, e.g.*, Letter from James H. Price to Thomas O. Miller (April 24, 1995), Ozone JA 388.

implementing the ozone NAAQS: "[a]s the petitioners argue," Subpart 2 of the 1990 Amendments "preclude[s] the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a (emphasis added).

EPA argues in its petition for certiorari that the "only issue before the court of appeals . . . was whether the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. 21. But this was clearly not the case, as State Petitioners recognize.[43] Indeed, the very first issue raised in CAA Industry Respondents' brief below was: "Whether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different NAAQS?" Furthermore, as the lower court's decision shows, CAA Industry Respondents specifically briefed and argued the issue of EPA's authority to implement a revised ozone NAAQS under Subpart 2 versus Subpart 1 of the Act. *See* EPA App. 40a.[44]

EPA then argues that it "did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS," and that actual implementation of the revised 8-hour NAAQS will be the subject of later proceedings establishing designations and classifications for the 8-hour NAAQS. EPA Pet. 20. But here again, EPA attacks a strawman. CAA Industry Respondents did not

---

[43] State Pet. at 14 (Industry argued that "EPA could neither issue nor enforce a revised ozone standard."); *see id.* at 22.

[44] Indeed, the lower court had to address CAA Industry Respondents' arguments regarding the enforceability of the revised NAAQS in order to fashion relief. *See* EPA App. 57a, 81a.

challenge EPA's designation or classification of areas under the 8-hour NAAQS. *See* EPA Pet. 20. Rather, they challenged EPA's legal conclusion, embodied in 40 C.F.R. § 50.9(b) of the final rule, State App. 113, that EPA has authority to revoke the statutory Subpart 2 ozone reduction program in certain areas, and to replace it in those areas with a program to be developed under the general planning authority of Subpart 1 for a revised ozone NAAQS that is more stringent than the 1-hour ozone NAAQS.

That decision was final. As EPA explained in the preamble to the final ozone rule, that rule reflects EPA's legal conclusion that "the provisions of subpart 2 . . . will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. . . . [T]he provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards."[45] EPA codified that final decision in § 50.9(b) of the final rule, State App. 113, which states that "[t]he 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard."

On this important issue, therefore, EPA's decisionmaking process was completed with promulgation of the final rule.[46] Furthermore, important legal consequences flow from this final rule, because of the differences in deadlines and control programs that apply under the Subpart 1 and Subpart 2 programs.[47]

---

[45] 62 Fed. Reg. 38,873, ICP App. 75a.

[46] *See id.* (noting that EPA's interpretation of the applicability of Subpart 2 was revised "in light of comments received on its proposed interpretation.").

[47] Thus, contrary to the Agency's assertions, *see* EPA Pet. 23-24, EPA's resolution of the applicability of Subpart 1 versus Subpart 2 to a revised

Indeed, in *EDF v. Browner*, D.C. Cir. No. 98-1363, EPA has asserted that the lower court lacks jurisdiction to hear EDF's challenge to EPA's revocation of the 1-hour NAAQS and Subpart 2 program in specific areas, because EPA's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was addressed and resolved in the ozone NAAQS rulemaking. EPA Br. in *EDF v. Browner* 27-28, ICP App. 85a-86a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation." ICP App. 86a.

Under CAA § 307(b), ICP App. 63a-64a, any challenge to a final legislative rule under the Act must be filed within 60 days of the rule's publication in the *Federal Register*. Because EPA resolved the interplay of Subpart 2 and EPA's NAAQS revision authority in the revised ozone rule and EPA's resolution of this issue is reflected in specific regulatory language (*i.e.*, § 50.9(b)), CAA Industry Respondents' only opportunity to challenge EPA's resolution of this issue was in this case.[48] For these reasons, EPA's belated attempt to manufacture a finality or ripeness argument provides no basis for certiorari.

---

ozone NAAQS plainly meets the conditions for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), and other cases cited in its petition.

[48] EPA's reliance on cases not addressing final agency regulations, promulgated after notice and comment rulemaking and expressly made subject to pre-enforcement judicial review, is misplaced. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998); *Dow Chemical v. United States Environmental Protection Agency*, 823 F.2d 319, 324-25 (5th Cir. 1987) (distinguishing final rules, developed after notice and comment rulemaking, that "fix[] a legal relationship.").

B. EPA's Arguments on the Merits, Which Have Been Rejected by the Panel and by the Court of Appeals *En Banc*, Provide No Basis for Certiorari.

The other arguments in EPA's petition for rehearing have been considered and repeatedly rejected by the lower court. While EPA asserts that the court misunderstood the CAA, EPA Pet. 25, certiorari is not a forum simply to re-argue matters resolved by the court of appeals. The circuit court's resolution of the interplay between Subpart 1 and Subpart 2 in implementing a revised NAAQS does not conflict with the decision of any other court and does not present a question of federal law that warrants the attention of this Court. *See* Sup. Ct. R. 10.

In support of its petition, EPA argues once again that "the CAA does not precisely address "how to reconcile Subpart 1 . . . . with Subpart 2." EPA Pet. 27. This is simply not the case, as the lower court carefully explained.

First, the court observed that CAA § 181(a) on its face provides that "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under Table 1, by operation of law." EPA App. 38a. This language establishes that Subpart 2 applies to "all areas designated nonattainment under any ozone NAAQS." *Id.* As the court explained, because "Congress has spoken on the 'precise question at issue,'" the court must give effect to the language of the Act under the first prong of *Chevron*. *Id.*[49]

---

[49] The court also reviewed the language of § 172(a)(1)(C) and (a)(2)(D), which specifically provides that the attainment date and classification provisions of Subpart 1 "do not apply to nonattainment areas for which

Second, the lower court addressed related CAA provisions, the structure of the Act, and its legislative history, and it found them all consistent with the plain language of § 181. For example, the panel rejected EPA's argument that the reference to "section 7407(d)" in § 181(a) should be read as "section 7407(d)(4)" in order to limit the application of Subpart 2 to areas that were designated nonattainment in 1990.[50] As the court observed, this is not the language of the statute, and the legislative history shows that Congress acted purposefully when it referenced "section 7407(d)" to make Subpart 2 applicable to *all* current and future ozone nonattainment areas. EPA App. 38a - 39a. As a result, the Subpart 2 program applies to one-hour *attainment* as well as one-hour nonattainment areas, *including [one-hour] attainment areas that are redesignated to nonattainment in the future.*[51]

Regarding the overall structure of the CAA nonattainment program, the court observed that "Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring

---

classification and attainment dates are specifically provided under other provisions of this part," as they are for ozone in Subpart 2. EPA App. 35a. While ALA now argues that the general planning requirements of Subpart 1 in § 172(b) and (c) do not contain similar "ouster" provisions, ALA Pet. 26, the simple response is that "ouster" language is not needed in these later subsections of § 172 once areas are "ousted" from the deadline and classification provisions that trigger the planning requirements.

[50] *See also* EPA Pet. 28 n.16. (Subpart 2 should be read to apply "only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard," based on § 107(d)(1) and (4)).

[51] CAA § 181(b)(1), EPA App. 119a (providing deadlines for attainment that are "extended by operation of law" for areas that are "subsequently redesignated to nonattainment for ozone.")

areas into attainment." EPA App. 39a. In order to resolve this problem, Congress in Subpart 2 decided not to "continue [to treat] all ozone nonattainment areas alike," but to provide different attainment deadlines and different control strategies for different areas depending on the ambient levels of ozone in an area in excess of the one-hour NAAQS. EPA App. 40a.

For example, Congress in Subpart 2 made clear that areas with intractable ozone problems (e.g., Los Angeles and Houston) would have to apply specific and aggressive control programs, but would not be subject to near-term, inflexible deadlines that could threaten economic shutdown. *See* EPA App. 41a. The court found that while EPA might have authority to revise the ozone NAAQS, EPA did *not* have authority to ignore the balance struck by Congress in Subpart 2 in favor of an alternative ozone reduction program under Subpart 1 that could require even more drastic measures.

As the court explained, under "EPA's interpretation . . . [the Subpart 2 statutory] scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after Congress enacted the 1990 amendments." EPA App. 42a. EPA's assertion of authority to revoke the statutory Subpart 2 program "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2," *id.*, and "clearly runs counter to the *comprehensive* enforcement scheme" based upon the one-hour NAAQS that Congress enacted in Subpart 2. EPA App. 41a (emphasis added).

The court also reviewed the legislative history, which shows that "Congress responded to the continued ozone problem [in 1990] by enacting a new enforcement scheme, which it codified as Subpart 2." EPA App. 32a. In other words, while Subpart 1 provides general planning requirements, Subpart 2 provides specific and detailed ozone-requirements for nonattainment areas, for attainment areas in

the ozone transport region, for "maintenance plans" in attainment areas, and for "attainment" areas that subsequently became "nonattainment" areas.[52] The legislative history confirms that Subpart 2 is "the Congress's comprehensive plan for reducing ozone levels *throughout* the country." EPA App. 33a (emphasis added).

In response to EPA's petition for rehearing below, the court clarified and confirmed its holding that "EPA can enforce a revised primary ozone NAAQS *only* in conformity with Subpart 2." EPA App. 81a (emphasis added).[53] The court also emphasized that its remand order was "without prejudice to the ability of any party to apply for vacatur" should EPA attempt to implement the revised standard. *Id.* As a result, the decision on rehearing confirms that, as the court held, the 1990 Amendments to the Act "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a. (emphasis added).

Finally, EPA argues that the lower court's decision will disrupt EPA's plans regarding ozone reductions.[54] But it is EPA's rule that has disrupted the carefully crafted *congressional* program for ozone reductions, and the court of appeals simply restored that program – a program that has produced and is continuing to produce substantial reductions in ozone. EPA's continued disagreement with this decision

---

[52] *See* CAA §§ 182-185A, ICP App. 8a-62a; *see also* H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. 3169 - 3172, 3253-3282.

[53] The State Petitioners correctly observe that Judge Tatel's concurring statement "is hard to reconcile . . . with the panel's opinion" regarding the non-enforceability of the revised ozone NAAQS. *See* State Pet. 22 n.8.

[54] *See* EPA Pet. 11; *see also* State Pet. 17, 28.

presents no conflict of law or important issue that merits certiorari.

C. The Interlocutory Nature of the Lower Court's Decision Counsels Against Granting Certiorari on the Subpart 2 Questions Presented by EPA.

The court of appeals remanded the revised ozone NAAQS to EPA because the Agency refused, as a statutory matter, to consider the increased public health risks (due to increased UVB radiation exposure) its revised standard would create. *See* EPA App. 47a - 48a. As a result, regardless of what this Court does here, EPA will have to undertake further rulemaking on the ozone standard to determine whether *any* standard revision is "appropriate" under § 109(d) in light of (1) the increased cancer and mortality risks associated with a more restrictive standard that increases UVB radiation exposure,[55] and (2) the conclusion of its independent science advisers that *none* of the alternative air quality levels under consideration can be distinguished as significantly more protective of public health.[56]

Because there will be additional rulemaking addressing the appropriateness of standard revision regardless of any action

---

[55] Ozone reductions of the magnitude associated with EPA's revised standard could result in 2,000-11,000 additional cases of melanoma skin cancer per year, 25-50 melanoma related deaths per year, and up to 28,000 new cataract cases per year due to increased ultraviolet-B radiation exposure. R. Lutter and C. Wolz, "UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard," 31 *Env'tl. Sci. & Tech. News* 142-46 (1997), Ozone JA 2759.

[56] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236.

by this Court, certiorari is unnecessary on the Subpart 2 issues.

CONCLUSION

For the foregoing reasons, if certiorari on the "nondelegation" issue is granted, it should embrace the issue presented by CAA Industry Cross-Petitioners in their Conditional Cross-Petition for Certiorari. Otherwise, certiorari should be denied on the questions presented by the Government and other petitioners.

Respectfully submitted,

DAVID E. MENOTTI
WILLIAM F. PEDERSEN
JEFFERY A. KNIGHT
SHAW PITTMAN
2300 N St., N.W.
Washington, D.C. 20037
(202) 663-8675
Counsel for American Forest & Paper Association; American Iron & Steel Institute; and Alliance of Automobile Manufacturers

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
LUCINDA M. LANGWORTHY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Appalachian Power Co., et al.; American Public Power Association; and National Association of Home Builders

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

DAVID F. ZOLL
ALEXANDRA DAPOLITO DUNN
CHEMICAL MANUFACTURERS ASSOCIATION
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5165
Counsel for Chemical Manufacturers Association

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

G. WILLIAM FRICK
M. ELIZABETH COX
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8250
Counsel for American Petroleum Institute

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

HAROLD P. QUINN, JR.
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-9793
Counsel for National Mining Association

DAVID M. FLANNERY
JACKSON & KELLY
P. O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group, and West Virginia Chamber of Commerce

RUSSELL S. FRYE
COLLIER, SHANNON RILL & SCOTT, PLLC
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8878
and
RICHARD WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION, INC.
1111 19th Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 463-2582
Counsel for American Forest & Paper Association, Inc.

JULIE BECKER
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5500
Counsel for Alliance of Automobile Manufacturers

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

GRANT CRANDALL
General Counsel
UNITED MINE WORKERS OF AMERICA, AFL-CIO
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7200
and
EUGENE M. TRISKO
P. O. Box 596
Berkeley Springs, WV 25411
(304) 258-1977
Counsel for United Mine Workers of America, AFL-CIO

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Company

February 28, 2000

(5) (4) (3)

Nos. 99-1257, 99-1263, 99-1265

Supreme Court, U.S.
FILED
FEB 2 8 2001
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN RESPONSE FOR RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Respondent Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for Respondents American Trucking Assoc., Inc. and Chamber of Commerce of the United States

*Additional Parties and Counsel Listed on Inside Cover

February 28, 2000

40pp

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act"), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the court of appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 3

A. The Clean Air Act 3

B. The EPA Rulemakings 4

1. The Ozone Rulemaking 4

2. The PM Rulemaking 6

C. The Congressional Response 7

D. The Court of Appeals Proceedings 8

1. Panel Proceedings 8

2. Rehearing Proceedings 9

REASONS FOR GRANTING THE PETITION IN PART AND DENYING THE PETITION IN PART 10

I. THE COURT SHOULD GRANT *CERTIORARI* BOTH ON THE GOVERNMENT'S FIRST QUESTION AS REFORMULATED TO REFLECT THE COURT OF APPEALS' ACTUAL HOLDING AND ON ATA'S CONDITIONAL CROSS-PETITION 10

A. The Court of Appeals Correctly Employed Constitutional Avoidance and Nondelegation Principles to Invalidate EPA's Standardless Statutory Interpretation 11

B. This Court Should Grant *Certiorari* on a Properly-Formulated Question That Encompasses the Statutory Interpretation Issues Covered in ATA's Conditional Cross-Petition 14

II. THIS COURT SHOULD DENY *CERTIORARI* ON THE SUBPART 2 QUESTIONS PRESENTED . 15

A. This Court Should Deny *Certiorari* on Both Subpart 2 Questions, Because, Unlike the Main Issue, Those Questions Are in an Interlocutory Posture. 16

B. The Subpart 2 Merits Question Does Not Warrant *Certiorari* 18

C. The Subpart 2 Ripeness/Finality Question Does Not Warrant *Certiorari* 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 28

American Airlines, Inc. v. Herman,
176 F.3d 283 (5th Cir. 1999) 26

American Power & Light Co. v. SEC,
329 U.S. 90 (1946) 12

AT&T Corp. v. Iowa Utils. Bd.,
119 S. Ct. 721 (1999) 14

Bell v. New Jersey,
461 U.S. 773 (1983) 28

Bennett v. Spear,
520 U.S. 154 (1997) 25

Chevron U.S.A. Inc. v. NRDC,
467 U.S. 837 (1984) 1, 9, 14, 15, 24

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. Civil Aeronautics Bd.,
333 U.S. 103 (1948) 25

Ciba-Geigy v. EPA,
801 F.2d 430 (D.C. Cir. 1986), ... 27

City of Kansas City v. Department of Housing & Urban Dev.,
923 F.2d 188 (D.C. Cir. 1991) 14

Dow Chem. v. EPA,
832 F.2d 319 (5th Cir. 1987) 26, 27

EPA v. National Crushed Stone Ass'n,
449 U.S. 64 (1980) 29, 30

FEA v. Algonquin SNG,
426 U.S. 548 (1976) 11

FTC v. Standard Oil Co.,
449 U.S. 232 (1980) 26

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916) 17

Harrison v. PPG Indus.,
446 U.S. 578 (1980) 28

Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.,
912 F.2d 1525 (D.C. Cir. 1990) 28

Hindes v. FDIC,
137 F.3d 148 (3d Cir. 1998) 26

Industrial Union Dep't AFL-CIO v. American Petroleum Inst.,
448 U.S. 607 (1980) 12, 13, 15

Lead Indus. Ass'n v. EPA,
647 F.2d 1130 (D.C. Cir. 1980) 1

Loving v. United States,
517 U.S. 748 (1996) 11

Magnum Import Co. v. Coty,
262 U.S. 159 (1923) 19, 26

Mistretta v. United States,
488 U.S. 361 (1989) 11, 12

Mobil Exploration & Producing U.S., Inc. v. Department of Interior,
180 F.3d 1192 (10th Cir. 1999) 26

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 3, 20

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 15

National Cable Television Ass'n v. United States,
415 U.S. 336 (1974) 12

NRDC v. EPA,
22 F.3d 1125 (D.C. Cir. 1994) 28

Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,
400 U.S. 62 (1970) 25, 27, 28

Ross v. Moffitt,
417 U.S. 600 (1974) 19

Thomas v. Union Carbide Agric. Prods. Co.,
473 U.S. 568 (1985) 29

Statutes:

Clean Air Act § 107(d),
42 U.S.C. § 7407(d) 4

Clean Air Act § 107(d)(1)(A),
42 U.S.C. § 7407(d)(1)(A) 21

Clean Air Act § 107(d)(1)(B)(i),
42 U.S.C. § 7407(d)(1)(B)(i) 22

Clean Air Act § 108(a)(2),
42 U.S.C. § 7408(a)(2) 16

Clean Air Act § 109(a),
42 U.S.C. § 7409(a) 3

Clean Air Act § 109(b)(1),
42 U.S.C. § 7409(b)(1) 4, 17

Clean Air Act § 109(b)(2),
42 U.S.C. § 7409(b)(2) 4

Clean Air Act § 109(d)(2),
42 U.S.C. § 7409(d)(2) 4, 17

Clean Air Act § 109(d)(2)(B),
42 U.S.C. § 7409(d)(2)(B) 16

Clean Air Act § 172(a),
42 U.S.C. § 7502(a) 21

Clean Air Act § 172(a)(1),
42 U.S.C. § 7502(a)(1) 4

Clean Air Act § 172(a)(1)(C),
42 U.S.C. § 7502(a)(1)(C) 21, 22

Clean Air Act § 172(a)(2),
42 U.S.C. § 7502(a)(2) 4

Clean Air Act § 172(a)(2)(D),
42 U.S.C. § 7502(a)(2)(D) 21

Clean Air Act § 181(a)(1),
42 U.S.C. § 7511(a)(1) 4, 21, 22

Clean Air Act § 307(b),
42 U.S.C. § 7607(b) 19

Clean Air Act § 307(b)(1),
42 U.S.C. § 7607(b)(1) 26

Clean Air Act § 307(d)(3),
42 U.S.C. § 7607(d)(3) 17

Clean Air Act § 307(d)(5),
42 U.S.C. § 7607(d)(5) 17

Clean Air Act § 307(d)(6)(B),
42 U.S.C. § 7607(d)(6)(B) 17

Pub. L. No. 105-178, § 6101,112 Stat. 465 (1998) 7, 8

Miscellaneous:

40 C.F.R. § 50.9(b) 27

62 Fed. Reg. 38,423 (1997) 27

62 Fed. Reg. 38,652 (July 18, 1997) 7, 12

62 Fed. Reg. 38,856 (July 18, 1997) 5, 6, 24, 27

63 Fed. Reg. 31,014 (June 5, 1998) 27

63 Fed. Reg. 39,432 (July 22, 1998) 27

64 Fed. Reg. 30,911 (June 9, 1999) 27

64 Fed. Reg. 57,424 (Oct. 25, 1999) 16, 27

Sup. Ct. Rule 10 ..... 19, 26

Robert L. Stern, *et al.*, SUPREME COURT PRACTICE
(7th ed. 1993) 17

INTRODUCTION

A properly reformulated version of the Government's first question is worthy of this Court's review for the reasons summarized in Part I below and detailed in the conditional cross-petition filed today by the American Trucking Associations, Inc., the Chamber of Commerce of the United States, and other "Small Business Petitioners" below (collectively "ATA"). The court of appeals invalidated the Environmental Protection Agency's ("EPA's" or "the Agency's") interpretation of its standard-setting authority under the Clean Air Act ("CAA" or "the Act"), using the framework provided by this Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). While the constitutionality of the underlying statutory provisions was never at issue, the court deployed the nondelegation and constitutional avoidance doctrines to invalidate EPA's statutory interpretation and to remand under *Chevron*. The court of appeals' interpretation was constrained by *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"), a decision never reviewed by this Court. ATA acquiesces in *certiorari* on a question properly framed to include all of the interrelated issues involving the interpretation of EPA's standard-setting authority, recognizing that the constitutional issues discussed below might be avoided entirely if *Lead Industries* were held to be wrongly decided.

The second and third questions presented by the Government (as well as the similar questions presented by the American Lung Association and State petitioners), concern entirely separate provisions of the Act, and are patently unworthy of *certiorari*. They involve Subpart 2 of the Act's Title I, Part D, which codifies a detailed schedule for gradual attainment of the National Ambient Air Quality Standard ("NAAQS") for ozone. At issue is EPA's decision to supplant Subpart 2 by requiring the States to attain a revised ozone NAAQS on an accelerated schedule that overrides the Subpart 2 schedule. The Agency's justification? That the *specific* classifications and attainment dates set forth in Subpart 2 do not "restrict EPA's *general*

authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

The court of appeals unanimously rejected EPA's argument and not a single judge voted to rehear the case on this issue. The Government's attempt to dress up its Subpart 2 point by belatedly raising finality and ripeness arguments was also unanimously rejected by all three panel members, and drew no interest from the *en banc* court. As explained in Part II below, the second and third questions do not warrant *certiorari* for at least three separate reasons.

First, the court of appeals' ruling on Subpart 2, unlike its ruling on the main issue presented, is interlocutory. That is because the court of appeals unanimously reversed EPA's ozone NAAQS on other grounds. Specifically, EPA argued that it was barred by statute from considering record evidence from officials of three separate federal agencies that reducing ground-level ozone by the amounts predicted for EPA's ozone NAAQS could lead to thousands of additional skin cancer and cataract cases every year. The unanimous court of appeals made quick work of that argument, both in its initial decision and in denying rehearing.

The Government does not seek *certiorari* on this issue and indeed never even mentions that it must redo its ozone NAAQS *independently* of the issues on which *certiorari* is being sought. But that remarkable omission cannot disguise the fact that the substantial new proceedings now required will take years to complete. Specifically, the Agency must commence a new rulemaking that will require, *inter alia*: (1) a revised scientific review document; (2) additional review by the Clean Air Scientific Advisory Committee ("CASAC"); and (3) a new proposal and final rule that address the evidence, cited by the court of appeals, that lowering the ozone NAAQS may have a *negative* net health effect. Every aspect of the Subpart 2 issue is on hold until these proceedings are completed. Only then would any remaining questions about the implementation schedule for a newly revised ozone NAAQS have to be revisited

by the court of appeals and, if necessary, this Court. *See* Part II-A below.

Second, the Government's merits argument concerning Subpart 2 is entirely unconvincing, as the unanimous court of appeals decision demonstrates. It is a "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Tellingly, not one member of the D.C. Circuit accepted EPA's contention that the scheme for implementing *NAAQS in general* trumped the specific provisions of Subpart 2 governing implementation of the *ozone NAAQS* in particular. *See* Part II-B below.

Finally, there is simply no basis for the Government's argument that the court of appeals lacked jurisdiction to reach the Subpart 2 issue. EPA never argued that the Subpart 2 ruling which *it* had made in the rulemaking below was not final until *after* the panel unanimously ruled against the Agency. Even EPA's rehearing petition devoted only about one page to arguing finality and ripeness – arguments that were unanimously rejected. Even now, the Government relies only on easily distinguishable cases that hold only that agency rulings sometimes are not final where (unlike here) they were *not* subject to formal notice and comment rulemakings, were *not* published in the Federal Register, and were *not* expressly made subject to prompt judicial review by statute. None of these cases presents a circuit conflict with the decision below, nor can the Government plausibly argue that the panel's application of settled finality and ripeness principles conflicts with any decisions of this Court. *See* Part II-C below.

COUNTERSTATEMENT OF THE CASE

A. The Clean Air Act

Section 109 of the Act authorizes EPA to establish primary and secondary NAAQS for certain pollutants and to reconsider and, if necessary, amend those standards every five years. CAA § 109(a), 42 U.S.C. § 7409(a). In general, NAAQS enactment

and enforcement entails three steps: promulgation, designation/classification, and then implementation through State Implementation Plans ("SIPs"). Primary NAAQS are promulgated at levels "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Secondary NAAQS are to be set at levels "requisite to protect the public welfare." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2).

Following the promulgation of a NAAQS, EPA must designate each air quality area as an attainment, nonattainment, or unclassifiable area. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The Agency then classifies each such area based on "factors such as the severity of nonattainment in such area," and assigns an attainment date based on that classification. *See* CAA § 172(a)(1), (2), 42 U.S.C. § 7502(a)(1), (2) ("Subpart 1").

As part of its 1990 amendments to the Act, Congress provided a "comprehensive plan for reducing ozone levels throughout the country." App. 33a. Each area is assigned a statutory classification based on the extent of its noncompliance with the existing ozone NAAQS, as well as a specific attainment date based on that classification. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2"). Congress enacted this regime to "strip[] the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment . . . ." App. 40a.

B. The EPA Rulemakings

Following the 1990 amendments, EPA initiated two rulemakings in 1996 to revise the NAAQS for ozone and particulate matter.

1. The Ozone Rulemaking

EPA's Clean Air Scientific Advisory Committee ("CASAC") is an independent scientific review committee that EPA must consult regarding NAAQS revisions. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2). In the ozone rulemaking, CASAC advised

the Agency that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." J.A. (Ozone) at 239. EPA nonetheless replaced the existing 0.12 ppm one-hour ozone NAAQS with a 0.08 ppm eight-hour standard based on a "policy" judgment that the latter standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38,856, 38,857, 38,863, 38,867 (July 18, 1997). In so doing, EPA asserted the right to render decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." *Id.* at 38,883 (emphasis added).

The Agency also ruled out any consideration of the health tradeoffs (for example, the prospect that reducing ground-level ozone could increase cancer levels) or the economic costs of its proposed rule. Commenters had submitted evidence that the health disbenefits of reducing ground-level ozone to the degree that EPA proposed could more than offset any benefits from increased respiratory protection. In particular, a study by the United States Department of Energy documented that, while the new ozone standard would cause some reduction in respiratory ailments, it would also increase the incidence of skin cancer, melanoma, and cataracts by permitting more ultraviolet radiation to reach ground level. J.A. (Ozone) at 255-71. A further study by Office of Management and Budget staff members concluded that the "adverse health effects of . . . EPA's more stringent [ozone] NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an [ozone] reduction," and a study by EPA personnel produced comparable results. *See id.* at 2764, 3089. Nonetheless, the Agency claimed that taking account of all health effects would be "inconsistent with the Clean Air Act and ill advised from an environmental management policy perspective." *Id.* at 210.

EPA also refused to consider the economic costs of its proposed standard on the ground that *Lead Industries* and subsequent D.C. Circuit decisions "interpreted section 109 of the Act as precluding consideration of the economic costs or feasibility of NAAQS in setting them." 62 Fed. Reg. at 38,878. The Agency acknowledged, however, that the costs of attaining the revised ozone NAAQS would greatly *exceed* the resulting benefits, perhaps by as much as six times. *See* J.A. (Ozone) at 2919, 2924, 2932-34 (costs could exceed $9 billion; benefits could be as low as $1.5 billion).

EPA also rejected the contention, made by many commenters, that it lacked authority to revise the ozone NAAQS. Those commenters relied on Subpart 2 of the 1990 amendments, which requires EPA to classify each nonattainment area into one of five specific categories, and does not provide a category for areas with ozone levels lower than 0.12 ppm (the level of the existing ozone NAAQS). EPA responded that because Subpart 2 "simply govern[s] the implementation of the [existing ozone] standard," the Agency is free to revise the ozone NAAQS and then ignore Subpart 2 altogether. *See* 62 Fed. Reg. at 38,885.

2. The PM Rulemaking

The PM rulemaking consisted of essentially two rulemakings: one rulemaking on fine PM ("$PM_{2.5}$"), and one rulemaking on coarse PM ("PM_{10}"). Since 1988, EPA had regulated all particles with diameters less than 10 micrometers under a single standard. *See* App. 49a. In the rulemaking below, however, EPA determined that "coarse and fine particles pose independent and distinct threats to public health," and that separate standards should be established. *See id.*

Although EPA concluded that the PM standards should be strengthened, CASAC expressed skepticism that this was necessary. In particular, nearly half of CASAC's members concluded that the PM standard should not be tightened at all, and many of the remaining panelists agreed that EPA's

proposed standard was too strict. *See* J.A. (PM) at 3151, 3165-66. These CASAC panelists explained that EPA had "overstated" the claimed health benefits of its proposal, in part because pollutants other than PM might be responsible for the effects that EPA attributed to PM. *See id.*

In response, EPA acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. 38,652, 38,655 (July 18, 1997). As it had in the ozone rulemaking, however, EPA asserted the right to promulgate the revised standard based on an *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

EPA also acknowledged that compliance with its revised PM NAAQS would cost at least $37 billion annually, J.A. (PM) at 3477, making this the most expensive environmental program ever. By EPA's own estimate, the costs of even partial compliance would greatly *exceed* the total annual sales of small businesses in several sectors, and therefore drive such companies out of business altogether. *Id.* at 3611-12, 3628. As it had in the ozone rulemaking, however, EPA publicly stated that it would not consider these extraordinarily high costs. 62 Fed. Reg. at 38,683.

C. The Congressional Response

Congress responded by postponing the implementation of the revised ozone and PM standards, and thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 107 (1998). In particular, Congress delayed implementation of the PM NAAQS until such a time as $PM_{2.5}$ monitors are put in place and three years' worth of data have been gathered. *See id.* § 6102. It also pushed back implementation of the ozone NAAQS by one year. *See id.* § 6103(a). Congress emphasized that "[n]othing" in its action

"shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the court of appeals, EPA continued to assert that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). The D.C. Circuit disagreed. In particular, the court held that Section 109 must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. *See* App. 5a. The court of appeals accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, modify the disputed NAAQS." *Id.* 4a, 5a. Judge Tatel dissented on this point. *See id.* at 59a.

The D.C. Circuit also unanimously remanded for entirely separate reasons. In the coarse particulate case, the court held that EPA erred in adopting an "arbitrary indicator for coarse particle pollution." *Id.* at 53a. As for ozone, the court rejected, both as contrary to the plain language of the Act and as unreasonable, EPA's "bizarre" contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." App. 47a.

Finally, while the court of appeals unanimously accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS, *see* App. 31a-43a, it unanimously rejected EPA's contention that "Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The plain language and drafting history of Subpart 2 confirm that the subpart applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' detailed handiwork was "purposeful

and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with . . . Subpart 2." *Id.* at 34a.

2. Rehearing Proceedings

In a petition for rehearing, EPA's lawyers argued that the Agency had followed a constitutional interpretation of the Act in the underlying rulemakings. The panel majority rejected that contention, and explained that "the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom." App. 73a. Accordingly, the court "express[ed] no opinion" on these *post hoc* rationalizations. *See id.* at 74a. The panel majority went on to emphasize that, when read in light of its context and purpose, the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle." App. 75a. Because the Act is ambiguous as to what that principle is, however, the court held that the appropriate remedy is a remand to the agency for development of a constitutional construction. *Id.* at 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).

EPA's rehearing petition also argued, for the first time, that the panel lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." App. 77a. All three judges rejected that contention. *Id.* at 79a. The court explained that "[w]hether agency action is final for purposes of [judicial review] entails a functional, not a formal, inquiry." *Id.* at 77a. Here, EPA had expressed its definitive position on the implementation issue, which is "a pure question of law, the resolution of which would not benefit from a more concrete setting." *Id.* at 77a-79a. In addition, EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

On the merits, EPA continued to press its contention that Subpart 2 amounts to a massive scrivener's error. *See* App. 79a. All three members of the panel again rejected that contention, and noted that "all five Subparts of the Clean Air Act providing requirements for nonattainment areas" contain the same language. *See id.* The *en banc* court unanimously denied rehearing on the Subpart 2 issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine. But he went on to emphasize that he was "quite uncertain" whether EPA's analysis satisfied the demands of "arbitrary and capricious" review. *See id.* at 96a. Judge Tatel also dissented from denial of rehearing and focused on use of the non-delegation canon. His opinion was joined by Chief Judge Edwards and Judge Garland. *See id.* at 97a.

REASONS FOR GRANTING THE PETITION IN PART AND DENYING THE PETITION IN PART

I. THE COURT SHOULD GRANT *CERTIORARI* BOTH ON THE GOVERNMENT'S FIRST QUESTION AS REFORMULATED TO REFLECT THE COURT OF APPEALS' ACTUAL HOLDING AND ON ATA'S CONDITIONAL CROSS-PETITION.

ATA submits that the court of appeals was certainly correct when it invalidated EPA's standardless interpretation of Sections 108 and 109, but also that the proper interpretation of these provisions is so exceptionally important that *certiorari* is warranted on that issue. In rejecting EPA's interpretation under *Chevron*, the panel majority faithfully followed this Court's precedents holding that constitutional avoidance and nondelegation principles retain vitality as construction canons. While the court was right to condemn EPA's assertion of unbridled and *ad hoc* policymaking authority, ATA submits that all sides would benefit from this Court's authoritative

construction of the Act for the reasons set forth in ATA's conditional cross-petition.

A. The Court of Appeals Correctly Employed Constitutional Avoidance and Nondelegation Principles to Invalidate EPA's Standardless Statutory Interpretation.

The Government bases its unusually strong condemnation of the court of appeals' decision on a red herring. The court of appeals did not hold Section 109 unconstitutional, much less mark out a "radical departure from settled law." Pet. 9. Instead, the D.C. Circuit merely (1) applied the traditional rule that agencies must construe their authorizing statutes to provide some "intelligible principle" to confine agency discretion and guide judicial review; and, finding that EPA failed to follow such an interpretation, (2) "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement." App. 4a, 5a.

It is therefore common ground that "'in our increasingly complex society . . ., Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" Pet. 16 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). There is also no dispute that while "the doctrine of unconstitutional delegation is . . . a fundamental element of our constitutional system," it is not "readily enforceable by the courts" in the manner of other constitutional guarantees. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

Confronted by these exigencies, the Court has responded, not by abandoning this "fundamental element" of the Constitution, but by transforming the nondelegation doctrine into a canon of construction. In particular, this Court has consistently held that Congress may delegate policymaking discretion to agencies *if* it provides an "intelligible principle" to guide the exercise of that discretion. *See, e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta*, 488 U.S. at 372; *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976). And, consistent with the

doctrine of constitutional avoidance, this Court has wielded this rule to construe statutes narrowly in order to supply the requisite "intelligible principle." *See, e.g., Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (plurality opinion) ("*Benzene*"); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Accordingly, while consistently rejecting claims that statutes should be *struck down* under the non-delegation doctrine, this Court has never waivered in "*giving narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 374 n.7 (emphasis added).

The court of appeals' deployment of these well-established construction canons hardly constitutes a "striking departure from this Court's nondelegation jurisprudence." Pet. 11. Rather, the "striking" fact about this case is that an agency of the federal government would assert and then defend up to the Supreme Court a supposed right to allocate tens of billions of dollars of public and private resources through decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." 62 Fed. Reg. at 38,688 (emphasis added).

Nor is there truth in the various other hyperbolic accusations hurled by the Government. Far from "overlooking this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context," *see* Pet. 12 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), the court of appeals expressly complied with that instruction, instructed the Agency to follow it, and quoted *American Power & Light* for that very proposition. *See* App. 75a. Nor did the court "expressly reject[] EPA's view that the relevant provisions of the CAA . . . set out intelligible principles." Pet. 7-8 (mischievously citing the *entirety* of the rehearing opinion below). Instead, the court proposed such a principle itself, noted that EPA "may well find

a completely different method for securing reasonable coherence" on remand, and went out of its way to "express no opinion" on the sufficiency of a principle proposed for the first time by EPA's appellate counsel on rehearing. *See* App. 18a, 74a. And finally, far from holding that "the nondelegation doctrine requires . . . a quantitative rule for deciding the precise degree of protection required for a given health or safety standard," Pet. 17; *see also id.* (court requires "exactly the 'right' result"), the panel made clear that EPA would retain authority to exercise "'policy judgment,'" and noted that it had previously upheld on nondelegation grounds an agency interpretation that allowed standards to be set "somewhere between" a given level and "some 'moderate' departure from that level." *See* App. 12a-13a.

As the court of appeals patiently explained, constitutional issues are lurking in this case only because the Agency's "construction" of its governing statute amounts to no construction at all. Specifically, the interpretation fails to "speak to" the critical question presented by the statute – the "issue of degree"– and thus leaves the agency "free to pick any point" it chooses. *See* App. 5a, 7a, 13a. Moreover, the inherent vice of EPA's interpretation is further worsened by the context in which it was issued – promulgation of the most expensive environmental program ever. In view of "the unprecedented power over American Industry that would result from the Government's view," a construction that "avoids this kind of open-ended grant should certainly be favored." *See Benzene*, 448 U.S. at 645, 646 (plurality opinion).

In the end, the Government is left with the surprising accusation that, by remanding to EPA so that the Agency itself can adopt a more constrained view of its authority, the court of appeals undertook a "fundamental change in the nature of judicial review of agency standard-setting" that would "expand the role of courts" and lead to "otherwise unwarranted judicial supervision in the exercise of administrative discretion." *See* Pet. 9, 16-17.

Once again, this is mere hyperbole. On its own terms, the court of appeals simply made the inevitable reconciliation between use of the modern nondelegation doctrine as a tool of interpretation, on the one hand, and the deference accorded under *Chevron* to agencies' interpretations of their governing statutes, on the other. As the court of appeals explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." App. 76a (citing *Chevron*). In this regard, the remedy selected below is functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron*. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999); *City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191 (D.C. Cir. 1991).

B. This Court Should Grant *Certiorari* on a Properly-Formulated Question That Encompasses the Statutory Interpretation Issues Covered in ATA's Conditional Cross-Petition.

The Government now concedes that EPA must develop a new interpretation of Sections 108 and 109 – at least to the extent necessary for it to consider the health "disbenefits" of lowering ground-level ozone levels. ATA agrees that EPA would benefit from this Court's plenary construction of these same sections, including whether the court of appeals was correct that EPA must ignore all factors "other than 'health effects relating to pollutants in the air'" in setting NAAQS. App. 15a; *see* ATA Cross-Petition. Review by the Court at this stage would increase the likelihood that EPA's next NAAQS rulemaking will be more successful than its last. *Cf.* Pet. 19 ("This Court should grant review . . . before EPA and other agencies refocus the[ir] analyses").

As drafted by the Government, however, the first question contains two significant flaws. *First*, it is somewhat misleading,

as it emphasizes the issue of whether Section 109 is unconstitutional (which it undisputedly is not), and downplays the real issue in this case: whether EPA used a standardless *interpretation* when issuing its ozone and PM NAAQS. Accordingly, the question presented should be reformulated to reflect accurately the holding of the court of appeals, and thus the issue before this Court, to wit: whether the court of appeals correctly rejected EPA's standardless interpretation, and remanded under *Chevron* for the Agency to fashion and apply a proper interpretation.

Second, the Government's question fails expressly to mention the court of appeals' interrelated and imbedded ruling that EPA may not consider "any factor other than 'health effects relating to pollutants in the air'" in setting a NAAQS. App. 15a. The court below recognized that this ruling would constrain the Agency's ability to develop an "intelligible principle" on remand, but felt it was precluded by circuit precedent from ruling otherwise. *See id.* at 18a. In order to ensure that *this Court* is not encumbered by arguments contending that it is jurisdictionally barred from issuing a comprehensive interpretation of the relevant provisions, and also to ensure that EPA receives the full and final guidance that it has requested, the Court should grant, or at least hold in abeyance, ATA's conditional cross-petition.

II. THIS COURT SHOULD DENY *CERTIORARI* ON THE SUBPART 2 QUESTIONS PRESENTED.

If it had properly formulated and presented its first question alone, EPA would have brought before the Court what is likely the most significant administrative law case since the 1980s trilogy of *Benzene*, *Chevron*, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). But instead, EPA has sought to piggy back onto that single *cert*-worthy question, two additional questions that do not deserve the Court's attention. Those two additional questions, both entirely unrelated to the main question presented, are (1) whether the court of appeals erred in

unanimously concluding that EPA's rulings on the Act's Subpart 2 are final and ripe for review; and (2) whether the court erred in unanimously rejecting EPA's contention that Subpart 2 could be effectively nullified. Taking those two unworthy questions would needlessly complicate what already promises to be an unusually complex case with numerous parties and the intersection of statutory construction, constitutional, and administrative law issues. As demonstrated below, neither question is remotely worthy of *certiorari*.

A. This Court Should Deny *Certiorari* on Both Subpart 2 Questions, Because, Unlike the Main Issue, Those Questions Are in an Interlocutory Posture.

Resolution of the second and third questions presented by EPA would have no practical effect at this time. Those issues address the question whether EPA may *implement* and *enforce* a revised ozone NAAQS outside of the framework provided by Subpart 2. They do *not* address – indeed they are entirely separate from – the question of the statutory standards and record that govern EPA's *promulgation* of a revised ozone NAAQS. Accordingly, any ruling by this Court on the second and third questions presented would not take effect until EPA promulgates a revised ozone NAAQS on remand – a point that EPA itself has underscored by suspending its implementation activities following the D.C. Circuit's invalidation of the revised ozone NAAQS. *See* 64 Fed. Reg. 57,424, 57,425 (Oct. 25, 1999).

How far off is a conclusion to any ozone remand proceedings and the first practical effects of the appellate court's Subpart 2 decision? *First*, EPA must revise its Section 108 criteria document for ozone, which will entail scientific review of not only ozone's heretofore ignored "positive effects," but also of the rest of "the latest scientific knowledge" relevant to ozone's effects on human health and welfare. CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). *Second*, CASAC must review that revised criteria document. CAA § 109(d)(2)(B), 42 U.S.C.

§ 7409(d)(2)(B). *Third*, EPA must draft a revised ozone NAAQS based in part on the revised criteria document and CASAC's review. *See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). *Fourth*, EPA must provide CASAC sufficient time to review its new proposal. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2)(B). *Fifth*, EPA must issue a notice of proposed rulemaking that explains any differences between its proposed rule and CASAC's recommendations. *See* CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). *Sixth*, EPA must permit time for meaningful comment, and respond to all significant comments. *See* CAA §§ 307(d)(5), (6)(B), 42 U.S.C. §§ 7607(d)(5), (6)(B).

All by itself, the three to five years that likely will be required to complete these steps is sufficient to warrant denial of *certiorari* on both Subpart 2 questions. "[E]xcept in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Ironically, EPA's petition only underscores this dispositive point. By principally contending that the D.C. Circuit erred on finality/ripeness grounds, EPA would place the proper time for review even farther out into the future.

To be sure, EPA must hope that its unworthy Subpart 2 issues can be smuggled into this Court under cover of the entirely separate first question presented. But the logic of ATA's acquiescence to *certiorari* on the main issue does not carry over to the Subpart 2 issues. On the main question, there is substantial disagreement within the D.C. Circuit, the nation's busiest administrative law court, concerning the interrelated statutory construction, constitutional, and administrative law issues presented here. Even if presented in an interlocutory posture (which it is not), *that* question – as opposed to unanimous rulings on non-recurring issues – is the type of question on which the Court might properly grant *certiorari*. *Cf.* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18 at 196 (7th ed. 1993) (interlocutory *certiorari* may be granted

"where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case").

But more importantly, the main question, unlike the Subpart 2 questions, is *not* in an interlocutory posture. EPA's regulations for fine particulate matter – the costliest part of the combined rulemakings with a minimum price tag of *$37 billion per year* – were invalidated based *only* on the court's rejection of EPA's standardless interpretation of the Act. If that invalidation is overturned, the fine PM rules would spring immediately back to life. By contrast, the Subpart 2 implementation issues are of no practical moment until EPA has completed the lengthy, multi-year remand proceedings independently required for ozone. Accordingly, even if the Subpart 2 issues otherwise warranted review (which they do not, *see* Sections B and C below), both the court of appeals and this Court will have ample time to provide that review years hence, once a valid ozone NAAQS has been promulgated. Until then, *certiorari* should be denied.

B. The Subpart 2 Merits Question Does Not Warrant *Certiorari*.

Under the traditional test for *certiorari*, the Subpart 2 merits issue may be one of the most unlikely candidates for review that this Court ever encounters in a government petition. Put aside the absence of dissents on this issue below, at either the panel or the *en banc* stage. The truth remains that the court's Subpart 2 ruling affects the interpretation of only one statute, can never give rise to a split among the circuits, and will not have any practical effect for years to come. As demonstrated below, those facts, coupled with an ever-changing EPA position on the issue and a decision below that is unassailable on its merits, make this issue a most unlikely candidate for *certiorari*.

1. The Subpart 2 Merits Question Fails to Satisfy the Criteria for Certiorari. The Subpart 2 issue involves "EPA's authority to implement and enforce [a] revised ozone NAAQS." Pet. 19-20. But the essential precondition to implementing or

enforcing a "revised" ozone NAAQS is, of course, the valid *promulgation* of a revised ozone NAAQS. Until that occurs, questions of enforcement and implementation cannot possibly arise.

In the meantime, there is no chance that the D.C. Circuit's decision will have ripple effects. Only the D.C. Circuit reviews NAAQS revisions, CAA § 307(b), 42 U.S.C. § 7607(b), so there is no potential for an inconsistency to develop among the circuits. Nor did the D.C. Circuit misstate or improperly invoke the rule of *Chevron*, the governing legal principle here. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *cf. Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("perceived correctness" is not a primary factor in granting *certiorari*); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Supreme Court does not sit as court of error).

For their part, the state petitioners claim that review is needed to dispel the "enormous uncertainty for the states as regulators." *See* Pet. of Mass. and N.J. 29. But any "uncertainty" that might once have existed has now been dispelled by the passage of the deadline for challenging the ruling invalidating the ozone NAAQS for EPA's failure to consider health "disbenefits." All States now know or should know that the 0.12 ppm one-hour ozone NAAQS, implemented and enforced via the congressionally-enacted regime of the Act's Subpart 2, is the only enforceable ozone NAAQS for the foreseeable future. True enough, there may be time lags involved as EPA reshapes its regulations to conform to this legal reality. *See id.* at 26-27 (describing such problems). But that is always the case when agency actions are reversed and new proceedings must be commenced.

Moreover, notwithstanding its claim to deference, *see* Pet. 25, 28-29, EPA now asserts that it has yet to complete its "full thinking" on this issue. *Id.* at 24; *see also id.* at 10 (Agency still needs time "to develop fully its interpretation").

This is an EPA assertion that rings true. Before the appellate panel, EPA argued that Congress had committed a particular scrivener's error. *See* App. 42a (EPA argues "section 107(d)" actually means "section 107(d)(4)"). Before the *en banc* court it argued for a different scrivener's error. *See id.* at 42a (EPA argues "section 107(d)" actually means "section 107(d)(1)(C) and section 107(d)(4)"). In this Court, EPA has now put claimed scrivening errors aside in favor of arguing about the statutory "context[s]." Pet. 28 n.16; *see* pp. 22, below. There should accordingly be an extraordinarily strong, conclusive presumption against review here, where EPA continues to change legal theories and the court of appeals has expressly left open the door to further proceedings once EPA promulgates a new rule (and identifies a coherent statutory interpretation) years out into the future. *See* App. 81a.

2. The D.C. Circuit Correctly Decided the Subpart 2 Merits Question. The Subpart 2 legal issue no doubt appears complex to the uninitiated. It involves EPA's authority to promulgate a revised ozone NAAQS, and then designate, classify, and set attainment dates for areas based on that revised NAAQS. In this Court, however, EPA seeks *certiorari* on a very narrow, easily-answered issue: whether the *specific* classifications and attainment dates set forth in Subpart 2 of the Act for the ozone NAAQS "restrict EPA's *general* authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

EPA's question answers itself, for "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Moreover, EPA's theory, as the court of appeals unanimously recognized, would have rendered Subpart 2 "stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments," and then proceeded to implement the revised NAAQS outside of the Subpart 2 framework. App. 42a. As the court of appeals held,

EPA cannot so easily eviscerate the "comprehensive enforcement scheme enacted in Subpart 2." *Id.* at 41a.

EPA correctly acknowledges that this issue turns on "the interplay among Section 107(d), Section 172, Section 181, and other relevant provisions" of the Act. *See* Pet. 24. Section 107(d) requires that "upon promulgation or revision" of a NAAQS, "the Administrator shall promulgate the designation of all areas" as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). As a general matter, Section 172 of Subpart 1 of the Act grants EPA authority to give classifications to those areas that it has designated as being in nonattainment, and to set attainment dates for those areas based on their classifications. *See* CAA § 172(a), 42 U.S.C. § 7502(a). By Section 172's own terms, however, that authority "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part," or "with respect to areas for which attainment dates are specifically provided under other provisions of this part." CAA §§ 172(a)(1)(C), (2)(D), 42 U.S.C. §§ 7502(a)(1)(C), (2)(D).

In the case of the ozone NAAQS, Section 181 of Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) of this title [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then provides classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.*

As the court of appeals explained, these provisions unambiguously refute EPA's contention that it can ignore Subpart 2 by "establish[ing] classifications and attainment dates and tak[ing] other implementing actions for the revised ozone NAAQS under Subpart 1." Pet. 27. In particular, Section 181(a) states that it applies to "[*e*]*ach* area designated

nonattainment for ozone *pursuant to section 7407(d)* [*CAA section 107(d)*]"; and Section 107(d), in turn, governs the "promulgation *or revision* of a national ambient air quality standard." *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added); CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) (emphasis added). Subpart 2 thus applies by the plain terms of Sections 107(d) and 181(a)(1) to *any* "ozone" NAAQS, including a revised ozone NAAQS.

EPA thus finds itself with no rejoinder for the argument that "Congress has spoken to the precise question at issue" and resolved it adverse to EPA. *See* App. 38a (citation and internal quotation marks omitted). The argument EPA tried below, that section 172 provides authority to enforce a revised NAAQS entirely apart from section 181(a) and the rest of Subpart 2, *see* EPA Ozone Br. at 67, is of no help, for that section emphasizes that it "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C).

In the court of appeals, EPA also argued that Section 181(a)(1)'s reference to the entirety of "Section 107(d)" is a scrivener's error, and that Subpart 2 should instead be read to apply only to designations made under particular parts of Section 107(d). *See, e.g.*, App. 79a. But as the D.C. Circuit explained, there is no basis for deeming the plain language of Section 181(a)(1) the "drafting error that the EPA's interpretation implies." *Id.* at 39a. In fact, "all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. *Id.* at 79a. EPA's "interpretation" thus posits not an isolated scrivening error, but a total scrivening breakdown.

Although derided by EPA as "highly technical," App. 28 n.16, the appellate court's analysis is a conventional, straightforward, statutory interpretation under the first prong of *Chevron*. EPA now downplays all of this evidence in an extended footnote that argues in favor of a fuzzy, multi-factor

analysis conducted under the rubric of "context." But that analysis identifies factors that might be relevant, at most, to *resolving* an ambiguity. *See* Pet. 28 n.16. Such considerations certainly cannot be used to *create* an ambiguity in the first place. *See* App. 43a. Moreover, if any ambiguity did exist, it would undoubtedly be resolved to EPA's disadvantage based on the persuasive evidence that Congress specifically considered and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims the *enacted* statute does. *See* App. 39a (discussing the drafting history of the 1990 amendments).

Whatever interpretation EPA may devise after taking "full opportunity" for further reflection, Pet. 21, the fact will remain that Congress replaced the pre-1990 discretionary regime of EPA ozone enforcement with a more stable, democratically-legitimate regime of *congressionally-mandated* controls. EPA may ask Congress to amend the Act, but it is not free to repeal Subpart 2, either by deeming it a "drafting error," or by invoking some insubstantial notion of "context." *See* App. 39a.

C. The Subpart 2 Ripeness/Finality Question Does Not Warrant *Certiorari*.

The remaining question EPA presents is largely contrived. EPA never argued that its Subpart 2 ruling was not final until *after* the panel had decided this issue against it. *See* App. 77a. Nor did the Agency devote more than a sentence of its court of appeals brief to its half-hearted ripeness challenge. *See id.* at 79a. Not surprisingly, the panel on rehearing summarily and unanimously rejected EPA's newfound position, App. 77a-79a, and not a single member of the *en banc* court disagreed.

1. The Subpart 2 Implementation Issues Were Included Within Other Unquestionably Final and Ripe Claims. EPA now complains loudly that the court below should have determined only whether Section 181 of Subpart 2 "precluded EPA from *promulgating* the revised standard," without ever addressing whether that section governed "how EPA could

implement the revised NAAQS." Pet. 21 (emphasis added). But that argument imagines a procedural history divorced from reality. In the actual proceedings, these two claims that EPA imagines as different were in fact one and the same claim.

EPA acknowledges, as it must, that the respondents argued before the agency that Section 181 "precluded EPA from revising the ozone NAAQS" pursuant to Section 109. Pet. 7. That argument rested on two premises: (1) what might be called the "implementation premise," the claim that section 181(a)(1) of the Act directs EPA to classify "each" nonattainment area for ozone according to the Subpart 2 categories, and (2) what might be called the "designation premise," the claim that section 107(d) requires "EPA to designate *all areas*" and requires a nonattainment designation for "*any* area that does not meet the NAAQS." J.A. (Ozone) at 3140-41. These two premises led respondents to conclude that the Act "expressly forbids downward revisions (but not upward revisions) to the 0.120 standard," *id.* at 3139, because in making such revisions, EPA would be "forced to violate the Act" – by discarding either section 181(a)(1) or section 107(d) or both.

Confronted with this argument in the agency rulemaking, EPA responded almost exclusively to the "implementation premise," arguing that Section 181 does not "prohibit[] EPA from revising the [ozone] standard" under Section 109 *because the Agency may "implement the revised [ozone] standard" outside of the Subpart 2 framework.* 62 Fed. Reg. at 38,885; *see also* EPA Ozone Br. at 67-72. Moreover, in the Court of Appeals, EPA continued to defend its authority to *promulgate* a revised standard based on its disagreement with the "implementation" premise, while implicitly contesting, but never fully discussing, the "designation" premise. *See* EPA Ozone Br. at 67-72.

To resolve this dispute, as it did, under step one of *Chevron*, the court of appeals necessarily had to bring to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including analysis of the statute as a whole. Also

under *Chevron*, the court had a duty to use as a starting point the implementing agency's own construction; that is, to address the specific link in the chain of logic that the EPA itself predominately contested – the "implementation" premise. Accordingly, if EPA's ripeness and finality concerns now seem at all plausible, it is only because they emit a distorted echo of two entirely innocent facts. The court below, in addition to ruling *against* EPA on the implementation issues it *did* contest vigorously, went on to rule *in EPA's favor* on the designation issues it *failed* to contest vigorously. In addition, the court composed an opinion that presents these issues in what it considered a comprehensible order, without noting that it was bound to rule first on the implementation premise that the agency itself had used as its primary legal defense.

2. The Decision Below Is Not in Conflict With Decisions of this Court or Other Circuits. There is no support whatever for EPA's contention that the court of appeals "adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals." Pet. 10, 21. In particular, EPA's contention that this Court should accept review because the D.C. Circuit's decision "distorts" this Court's decision in *Bennett v. Spear* is mystifying. *See id.* at 22 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

Bennett merely repeats the well-established standard for administrative finality. *See* 520 U.S. at 177-78 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 113 (1948)). The Court there held that the agency ruling at issue was final because it "alter[ed] the legal regime" – even though it did *not* "conclusively determine" the plaintiffs' rights. *See Bennett*, 520 U.S. at 177, 178. As that holding suggests, the two prongs of the finality test recited in *Bennett* are not the inflexible rules that EPA makes them out to be. Rather, "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in

a pragmatic way" by taking a "flexible view of finality." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (internal quotations omitted).

Here, the panel unanimously held that the Agency's Subpart 2 ruling is final because (1) it is not tentative, and (2) legal consequences flow from it. *See* App. 77a-78a. There is no sense in which that decision conflicts with *Bennett*. Rather, the most that EPA could plausibly contend is that the D.C. Circuit misapplied "a properly stated rule of law," a claim that does not supply a proper ground for *certiorari*. *See* Sup. Ct. R. 10; *Magnum*, 262 U.S. at 163.

Nor does the D.C. Circuit's decision stand in conflict with decisions of other courts of appeals. In particular, the *Dow Chemical* case highlighted by the Government holds only that statements made "while requesting certain data" prior to the initiation of an enforcement action, as well as statements made in an "amendment of [an] enforcement suit," are not final agency action. *See Dow Chem. v. EPA*, 832 F.2d 319, 324, 325 (5th Cir. 1987). The other cases cited by the Government similarly hold only that the initiation of an administrative investigation or adjudicatory process, or the announcement of an interlocutory ruling in the course of an ongoing administrative proceeding, is likewise not final. *See Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1199 (10th Cir. 1999); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 289 (5th Cir. 1999); *Hindes v. FDIC*, 137 F.3d 148, 162-63 (3d Cir. 1998). Those cases all involved truly interlocutory matters, not, like this case, a final rule, published in the *Federal Register*, and made expressly reviewable by statute. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Moreover, the absence of any circuit split is further underscored by the fact that *Mobil Exploration* explicitly relied on D.C. Circuit precedent, *see* 180 F.3d at 1199, while *Dow Chemical* specifically distinguished as inapposite one of the very D.C. Circuit cases on which the panel below relied. *See*

832 F.2d at 325 n.35 (distinguishing *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986)); App. 77a (quoting *Ciba-Geigy*).

3. The Court of Appeals' Decision Is Correct. On the merits, EPA appears to be claiming that its Subpart 2 ruling will not be final until a revised ozone NAAQS is actually implemented and enforced in a specific area. *See* Pet. 22. In particular, EPA argues that the first prong of the finality test is not met because it has not "completed its decisonmaking process under the governing statute for the specific agency action at issue," since it "has not designated nonattainment areas, classified those areas, or set attainment dates" for those areas. *Id.* The Agency similarly contends that the second prong is not satisfied because "ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates." *Id.* at 23.

But EPA did far more in the rulemaking below than merely promulgate the revised NAAQS. Based on its "interpretation" of "the provisions of subpart 2," EPA's final ozone rule specifies the point at which Subpart 2 and the existing ozone NAAQS "will no longer apply." 62 Fed. Reg. at 38,873; *id.* at 38,894 (codifying this ruling into 40 C.F.R. § 50.9(b)). The Agency also determined, simultaneously with the ozone NAAQS revisions, how and where its new ozone NAAQS would be enforced. 62 Fed. Reg. 38,423, 38,424-27 (1997). EPA then issued three final rules revoking the existing ozone NAAQS in certain areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998). Only after the D.C. Circuit issued its opinion in this case did EPA cease its "continu[ing] implementation efforts with respect to the 8-hour standard." 64 Fed. Reg. at 57,425.

In any event, the Government's argument against pre-implementation review "has the hollow ring of another era." *Port of Boston*, 400 U.S. at 71. Modern finality jurisprudence

has "interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). This Court has specifically rejected the "argument that [an] order lacked finality because it had no independent effect on anyone and resembled an interlocutory court order," *Port of Boston*, 400 U.S. at 70-71, and has routinely authorized pre-enforcement review of agency determinations. *See, e.g., Bell*, 461 U.S. at 779-80; *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980) (EPA ruling final under CAA § 307(b)(1) where "[s]hort of an enforcement action, EPA has rendered its last word on the matter"); *Port of Boston*, 400 U.S.at 70-71; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967) (citing cases).

As the D.C. Circuit has repeatedly held, these precedents have particularly strong force in the context of the Act. Congress has, on the face of that statute, "declared a preference for prompt review" by providing that petitions for review of EPA rulemakings must be filed "within 60 days from the date notice of such . . . action appears in the federal register." *See NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (citing CAA § 307(b)(1)) (internal quotation omitted); *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (same). The D.C. Circuit has therefore always understood EPA's general NAAQS implementation rulings (as opposed to its specific classification decisions) to be final even before they have been applied in the context of a particular state's submission of a SIP. *See NRDC*, 22 F.3d at 1133.

So has EPA. Tellingly, EPA accepted the D.C. Circuit's virtually identical ruling in *NRDC* without even petitioning for review in this Court. More telling still, in a different proceeding before the D.C. Circuit last summer, EPA argued that a separate petition for review that challenged the Agency's now-suspended implementation of the revised ozone NAAQS was precluded precisely because *this case* is the proper vehicle for resolving such challenges. In particular, EPA contended that because the

Agency's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was "resolved by the 1997 Rule" (*i.e.*, the rulemaking below), challenges to that interpretation had to be brought in *this* proceeding, not in subsequent actions challenging specific implementation decisions. *See* Br. of Resp. U.S. E.P.A. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, EPA would have this Court grant *certiorari* and hold its Subpart 2 ruling non-final even though (1) the D.C. Circuit had to resolve the Subpart 2 issue in the course of deciding whether EPA had authority to promulgate the revised ozone NAAQS; (2) EPA recognized as much by not disputing the finality of its ruling until after it lost in the court of appeals; (3) there is no circuit conflict for this Court to resolve; (4) this Court has long emphasized that the finality test is pragmatic and flexible; (5) EPA began implementation activities in the underlying rulemaking itself; (6) Congress expressed a desire for prompt pre-implementation review of EPA's actions under the Act; (7) multiple panels of the D.C. Circuit have long rejected EPA's contention; and (8) EPA is trying to have it both ways in order to evade judicial review altogether. There is no justification for *certiorari* in such circumstances.

EPA's ripeness challenge fails for similar reasons. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation omitted). Accordingly, this Court has consistently held EPA rulings to be fit for review where, as here, "[t]he issue presented . . . is purely legal, . . . will not be clarified by further factual development," and has had pre-enforcement effects such as those described above. *See id.* at 581; *see also EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Moreover, this Court has authorized pre-implementation review of a variance clause in an EPA regulation where the validity of the variance clause was intertwined with the validity of the

regulation as a whole. *See National Crushed Stone*, 449 U.S. at 72 n.12. As explained above, that is precisely the situation that the court of appeals confronted here: interpretation of Subpart 2 is intertwined with an argument made below (but not in this Court) regarding interpretation of EPA's authority to revise the ozone NAAQS. The issue was therefore ripe for review in the court below.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* on a properly formulated question which encompasses the statutory interpretation issues covered in ATA's conditional cross-petition. The Court should deny the Government's petition on the second and third questions presented, as well as all questions presented by the American Lung Association and the State Petitioners.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for American Trucking Associations, Inc. and Chamber of Commerce of the United States

(9) (5) (4) (2)

Nos. 99-1257, 99-1263, 99-1265 and 99-1426

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 14 2000
CLERK

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

(*Case Captions Continued on Inside Cover*)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

March 14, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

22 pp

MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Cross-Respondents.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	1
I. INTRODUCTION AND BACKGROUND	1
II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS	5
III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS	8
A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action	9
B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels	12
C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*	14
IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE	16
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:	Page
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	8
Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally, 337 F. Supp. 737 (D.D.C. 1971)	11
Bennett v. Spear, 520 U.S. 154 (1997)	2
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)	12
Buttfield v. Stranahan, 192 U.S. 470 (1904)	9
Chevron v. NRDC, 467 U.S. 837 (1984)	15, 16
Clinton v. City of New York, 524 U.S. 417 (1998)	9
Fahey v. Mallonee, 332 U.S. 245 (1947)	11
Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996)	15
Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607 (1980)	11, 13
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)	9
Kent v. Dulles, 357 U.S. 116 (1958)	11
Lead Indus. Assn. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980)	4, 7
Lichter v. United States, 334 U.S. 742 (1948)	11
Mistretta v. United States, 488 U.S. 361 (1989)	9, 11
Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)	16
National Cable Television Assn. v. United States, 415 U.S. 336 (1974)	11
Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989)	11
South Dakota v. United States Dep't of Interior, 69 F.3d 878 (8th Cir. 1995), *vacated & remanded on change in petitioner's position*, 519 U.S. 919 (1996)	9
Touby v. United States, 500 U.S. 160 (1991)	10
Yakus v. United States, 321 U.S. 414 (1944)	11
Zemel v. Rusk, 381 U.S. 1 (1965)	11
Statutes:	
5 U.S.C. § 706(2)(A)	16
26 U.S.C. § 501(c)(3)	1

TABLE OF AUTHORITIES—Continued

	Page
Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1)	3, 8
Clean Air Act § 307(d), 42 U.S.C. § 7607(d)	12
Miscellaneous:	
U.S. Constitution, Art. I. §§ 1, 8	9
EPA Ozone Rule, 62 Fed. Reg. 38,855 (July 18, 1997)	6
Regulatory Impact Analysis (July 16, 1997) Ozone JA 2924, 2934	6
CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238	5
CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162	5, 6
Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 Int'l J. of Risk Analysis 403 (August 1997)	6
EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089	6
Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999)	7
RSP Comments in EPA Ozone/PM Rulemaking (submitted March 12, 1997 (www.gmu.edu/mercatus/)	7
Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59	6
Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993)	7
P. Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995)	10
Webster's New World Dictionary 21 (College Edition 1964)	12

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3), whose Regulatory Studies Program ("RSP") is dedicated to advancing knowledge of administrative regulations and their impact on society.* RSP submitted comments to the Environmental Protection Agency on the proposed national ambient air quality standards for ozone and particulate matter that are the subject of the Petitions herein. Its comments focused on the inadequacy of the scientific foundation of the proposed standards and on the disproportionate risks they would impose on the general population, both because ozone provides direct health benefits that should be considered, and because the extraordinary cost of achieving the standards would adversely affect public health.

The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The central issue in the petitions for a writ of certiorari filed separately by the Environmental Protection Agency

---

* Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

("EPA"), the American Lung Association ("ALA"), and Massachusetts and New Jersey ("States") is whether the court of appeals properly interpreted the nondelegation doctrine when it reversed and remanded the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter because EPA's interpretation of Section 109 of the Clean Air Act ("CAA") stated no "intelligible principle" on which the levels were based.

Petitioners rely primarily on three contentions to justify review. First, they argue that as a matter of public policy, the ozone and particulate matter rules are fundamentally sound and of "immense practical importance to the health of the American public." EPA Pet. 9; see State Pet. 26-28; ALA Pet. 15-17. Second, they assert that the lower "court's decision represents a radical departure from settled law respecting the nondelegation doctrine." EPA Pet. 9; see *id.* 11-19. Third, they charge that the lower court's ruling would improperly "expand the role of courts in reviewing agency action." *Id.* 9.[1]

None of Petitioners' arguments is meritorious. First, the EPA rules will not improve public health. They are

[1] We do not address the issue raised by EPA but not by other petitioners, namely, whether EPA had taken final action and, thus, whether the Subpart 2 implementation issues were ripe for review. EPA Pet. 19-21. Contrary to the EPA petition, we believe it is clear beyond reasonable argument that the EPA's action here—"two *final* EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone," EPA Pet. 2 (emphasis added)—"alters the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (biological opinion isued by Fish & Wildlife Service under Endangered Species Act constitutes final agency action). The EPA rulemaking "implicate[s] the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS." State Pet. 26. The EPA petitioners dispute the application of the finality/ripeness tests but identify no conflict among the circuits on this issue or confusion in the criteria to be applied.

based on highly uncertain evidence and ignore important countervailing health considerations.

Second, the lower court did not misunderstand the nondelegation doctrine. It applied the doctrine in a traditional and reasonable fashion, focusing on the absence of any intelligible standard in the agency's interpretation of the CAA and identifying how the agency might construe the statute to save it from being found invalid.

Third, the appeals court did not apply the nondelegation doctrine to reverse a Congressional delegation to the EPA, nor did it, itself, reinterpret the statute to conform to its views of the constitutional norm. Instead, it took a far less intrusive approach, consistent with this Court's decision in *Chevron*, of remanding the matter to the agency for EPA to interpret the CAA consistent with the "intelligible principles" requirement of the nondelegation doctrine.

Under the Clean Air Act, EPA is to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In the case of ozone and particulate matter ("PM"), EPA's evidence suggests that there is no threshold below which either pollutant would not pose health threats. However, EPA failed to identify specific standards or measurable factors consistent with the CAA as the basis for the NAAQS levels it selected. It interpreted the CAA as allowing it to choose any point along a "linear nonthreshold" [2] continuum and to claim that the

[2] The linear, nonthreshold dose-response model that EPA uses in its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the nonthreshold aspect of the model. The linear aspect of the model assumes that regard-

selected point provides an adequate margin of safety—without regard to whether that margin could be satisfied at a less stringent level.

Because the linear nonthreshold model attributes health benefits to each further reduction in ozone and PM, no matter how clean the air already may be, and without regard to the overall effect on public health, EPA's interpretation of the CAA would allow it to set the level for each at zero. It relies upon "policy judgments" to justify its selected standards. Thus, any level chosen by EPA—"any point between zero and a hair below the concentrations yielding London's Killer Fog," Pet. App. 13a—is automatically permissible under the agency's reading of the CAA because, according to EPA, the statute imposes no limits on its policy judgment.

The basic fault in EPA's misguided interpretation of the CAA, and thus of its NAAQS rules, derives from the D.C. Circuit's decision in *Lead Indus. Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), holding that § 109 of the CAA prohibits the consideration of "any factor other than 'health effects relating to pollutants in the air'" in setting NAAQS levels. *See* Pet. App. 15a. This reading of the CAA is not supported by the text, structure, context or legislative history of the Act, see ATA Cross-Pet. 14-15, or by rational policy analysis. Protecting public health necessarily involves consideration of a broad range of factors, including trade-offs between different health effects and the costs of implementing a standard, because large costs themselves can have negative public health consequences.

---

less of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect.

II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS

EPA's revised NAAQS would reduce the allowed level of ground-level ozone by about 10 percent and regulate very fine particles ($PM_{2.5}$) for the first time. It argued that these revisions were necessary to protect the public from respiratory health effects, especially asthma. Contrary to EPA's assertions that these rules would make a significant contribution to public health, the standards have little scientific merit, were not endorsed by EPA's own scientific advisors, and were based on unduly narrow health considerations. EPA has presented no evidence that the new standards are achievable, and even if they were, EPA cannot demonstrate that they are likely to be more protective of public health than current NAAQS levels. In fact, the opposite is true.

For the ozone standard, EPA's Clean Air Scientific Advisory Committee ("CASAC"), a legislatively-established body of independent experts which provides advice to EPA on scientific and engineering issues, concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238. Moreover, the majority of members on the panel who expressed an opinion preferred a level less stringent than that proposed by EPA. *Id.*

Similarly for the PM standard, CASAC could find no consensus for selecting "the level, averaging time, or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162. Only 2 of the 21 scientists on CASAC were willing to

endorse a general range as stringent as the range adopted in EPA's $PM_{2.5}$ standard. *Id.* 3165.

EPA ignored other important information relevant to public health in setting the ozone and PM levels. For example, it acknowledged that, due to ozone's screening effect on harmful ultraviolet-B radiation, the reduction in ozone levels mandated by the NAAQS will increase malignant and nonmelanoma skin cancers and cataracts. EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089-3104. Nonetheless, EPA ignored these data in setting the ozone standard. In uncontradicted evidence submitted to EPA, the Department of Energy projected that a 10 ppb reduction in ozone concentrations, as required by the ozone rule herein, would result in 25 to 50 new melanoma-caused fatalaties, 130-260 incidences of cutaneous melanoma, 2,000-11,000 new cases of nonmelanoma skin cancer, and 13,000 to 28,000 incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59. These negative health effects of the ozone standard dwarf EPA's projected positive health effects, which do not include any reduction in deaths. *See* Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare*, 17 Int'l J. of Risk Analysis 403 (August 1997).

EPA itself concedes that the costs of the new ozone regulation will far exceed its benefits, but asserts that under *Lead Industries* the agency may not consider implementation costs when setting NAAQS. *EPA Ozone Rule*, 62 Fed. Reg. 38,855, 38878 (July 18, 1997); *Regulatory Impact Analysis*, Ozone JA 2924, 2934 (July 16, 1997). Yet mounting research shows that regulatory costs do affect public health because such costs represent fore-

gone opportunities to improve health and safety—e.g., disease prevention, better diets and improved sewage treatment. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, [and] more heart attacks"). Studies linking income and mortality find that every $15 million decline in incomes results in one statistical death. Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999). Applying this analytical framework to the ozone and PM rules herein, the Mercatus Center's Regulatory Studies Program estimates that full compliance could exceed $100 billion per year and increase mortality by over 6,500 deaths per year (not including the increase in melanoma deaths from UV-B exposure). *See RSP Comments in EPA Ozone/PM Rulemaking* (submitted March 12, 1997) (available at www.gmu.edu/mercatus/).

This disregard for the "wealth-health" effect is a direct result of the D.C. Circuit decision in *Lead Industries* barring consideration of costs because the CAA "makes no mention of such factors." 647 F.2d at 1149 n.37. Both EPA and the lower court interpreted *Lead Industries* as limiting the NAAQS rulemaking to direct health effects and as not permitting consideration of the costs and their relationship to benefits imposed by the rule and of whether the costs imposed by the rule will result in a net reduction in human health or a net increase in lives lost. ATA Cross Pet. 6. However, as the ATA Cross Petition shows, the ruling in *Lead Industries* is based on an erroneous reading of the CAA, has been extended improperly beyond its basis, is contrary to the principles and rationale of this Court's ruling in *Benzene* (discussed *infra* pp. 13-14), and should be reconsidered as urged by Respondents below. ATA Cross Pet. 14-18.

III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS

This case does not require application of the nondelegation doctrine to overturn the CAA or otherwise to interfere with broad legislative delegations of administrative authority. It also does not require that the doctrine be revised before being applied as a prophylactic canon of construction. Finally, the Court need not consider whether the CAA's defining terms—that the NAAQS standards must "protect the public health" with an "adequate margin of safety," CAA § 109(b)(1)—are unconstitutionally unconfined and therefore should be overturned.

Rather, the issue here is a narrow one. The court below limited its ruling and held only that it is the agency's responsibility to interpret the statute, if possible, in a manner that is consistent with the principles of the nondelegation rule. What the court said is that EPA is *not* free to read the CAA terms as setting virtually no definable limits on the agency's authority when setting NAAQS for ozone and PM, while ignoring a more specific construction that could provide a principled basis for the agency's rules.

We believe that the analysis applied by the court below is correct and consistent with numerous cases decided since 1935 and 1936 when the doctrine was last applied by this Court to directly invalidate a Congressional enactment. Administrative agencies are obliged to interpret their authority to avoid unchanneled delegations of discretion to the agency. To rule otherwise is to raise the specter of "delegation[s] running riot," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), and to disregard the first operative sentence of the Constitution that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Art. I, § 1; *see also id.* Art. I, § 8.

A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action

The core requirement of the nondelegation doctrine is undisputed by Petitioners. EPA Pet. 13. It establishes that legislative authority delegated by Congress to the executive must state "intelligible principles," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), by which the agency is given a "primary standard" to guide its action. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see Clinton v. City of New York*, 524 U.S. 417, 484-96 (1998) (Breyer, J., dissenting). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

That the nondelegation doctrine is rarely applied to invalidate legislation does not mean that it has been abandoned or that it is without continuing substantial influence. *See South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (invalidating Indian Reorganization Act authorizing Interior Secretary to acquire lands in trust for tribes because Act provided no "intelligible principles" for determining when that authority could be exercised), *vacated & remanded on change in petitioner's position*, 519 U.S. 919, 920-23 (1996). It has an "important and continuing 'shadow' impact" on the reading and review of legislative delegations. P.

Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995).

For example, in *Touby v. United States*, 500 U.S. 160 (1991), the Attorney General's broad discretion to temporarily add or remove psychoactive drugs from the "schedules" of prohibited or regulated controlled substances was upheld. In upholding this authority, however, the Court relied heavily on two concessions by the Government which more narrowly confined the Attorney General's discretion. First, it acknowledged that a drug could not be added to Schedule I (the most harmful category) without first being subject to additional testing. Second, the provision freeing temporary scheduling orders from judicial review did not preclude a defendant facing criminal charges from asserting a challenge to the temporary scheduling order as a defense to the prosecution. *See id.* 170 (Marshall, J., concurring).

Thus, the nondelegation doctrine does not mean that Congress cannot delegate broadly or allow executive agencies substantial discretion. And there are numerous examples, which Petitioners trumpet, EPA Pet. 12 n.5, of facially open-ended statutory "standards" that delegate to an agency the power to determine what are "excessive profits," "fair and equitable" prices, "just and reasonable rates," and "unfair methods of competition" which have been upheld. But in every case, the Court has identified specific limits or compelling constitutional reasons justifying the delegation before upholding the statute or rule.

What Petitioners fail to recognize is that these open-ended statutory standards have been upheld only after finding an exceptional circumstance (e.g., relying on the President's extensive war powers or authority to conduct foreign affairs) justifying the delegation or because the executive discretion was bounded by precedent, recognized principles implicit in the statute, or other similar restrictions. For example, *Yakus v. United States*, 321 U.S. 414 (1944) and *Lichter v. United States*, 334 U.S. 742 (1948) are emergency wartime measures where "broad discretion . . . may be essential." *Id.* 779. *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) upheld broad powers to oversee banking because a long history of such regulation had established specific common law standards which guided the regulators. And *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.) upheld non-wartime wage and price controls only after finding that the administrative authority was confined by price control precedents and after incorporating other restrictions including APA procedures and opportunities for judicial review in the regulatory program.

There also are even more cases where administrative action was upheld only after the Court "reinterpreted" the statute to find an implied condition limiting the facial agency authority. *E.g., Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974) (narrowing basis for FCC to set cable television fees); *Zemel v. Rusk*, 381 U.S. 1 (1965) (reading areas of restrictions on passports as limited by "prior administrative practice"); *Kent v. Dulles*, 357 U.S. 116 (1958) (reading passport authority narrowly to deny Secretary of State power to refuse a passport on grounds of political belief). The typical application of the nondelegation doctrine, in fact, is by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States, supra* at 374 n.7; *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels

The lower court here similarly found EPA's interpretation of the CAA inadequate because the agency had failed to find any limit on its authority to select the levels at which the ozone and PM standards were to be set. The D.C. Circuit held that § 109 and related sections of the Act must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. Finding that EPA had failed to define such a standard in the CAA, the court remanded the rules for "EPA to develop a construction of the act that satisfies this constitutional requirement." Pet. App. 4a.

The Government's Petition now claims to have found a standard in EPA's interpretation of the CAA because the Act "requires EPA to develop the [limiting substantive] 'criteria' " in accordance with established rulemaking and judicial review procedures in § 307(d), 42 U.S.C. § 7607(d), and as derived from the Act's legislative history which references "adverse effects." EPA Pet. 13-15 & n.8. However, this description of EPA's approach has no support in the record and is inconsistent with EPA's position below. This contrived effort to seek shelter under the *Benzene* ruling fails because the term "adverse" tells us nothing about the degree of harm which must be found. To say that something must be "unfavorable" or "harmful" [3] does not tell us how harmful, or that the harm must be substantial or significant. In any case, EPA's rule cannot be upheld on a view not adopted by EPA but advanced for the first time by counsel before this Court. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appel-

[3] *Webster's New World Dictionary* 21 (College Edition 1964) (defining "adverse" as something "unfavorable, harmful").

late counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated by the agency itself.").

The situation here is closely analogous to *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion) (*Benzene*), where this Court reversed an OSHA rule issued by the Secretary of Labor that would have imposed stringent measures to minimize worker exposure to benzene, a cancer-causing chemical. According to the Court plurality, the rule could not be justified by the statutory terms requiring employers to protect their workers "to the extent feasible" from harm due to toxic substances because feasibility was not, at least on its face, a sufficiently limiting requirement. However, after reviewing the organic act, its terms and context, the plurality determined that the "feasibility" requirement was adequate because it required the Secretary to make a finding that the preexisting situation created a "significant risk" (which the OSHA rule could then alleviate). With that addition, the impermissibly standardless facial authority was held to satisfy the nondelegation doctrine. That is, the plurality narrowed the feasibility standard in the statute by interpreting it as including a significant risk test. It then remanded the matter to the agency for reconsideration of the rule under the revised interpretation of its statutory authority.[4] As here,

[4] The *Benzene* plurality became a majority with the vote of then-Justice Rehnquist who would have invalidated the statute as an impermissible delegation. He found the statute's "to the extent feasible" standard a "mirage" and unconstitutional because Congress had delegated to the Secretary the "fundamental" policy decision of "where on the continuum of relative safety [the Secretary] should draw his line." 448 U.S. at 675, 681, 687-88. Under its interpretation of § 109 of the CAA, EPA claims the same discretion here.

however, the facially open-ended grant of authority to the agency was not upheld and the agency was afforded the opportunity to apply the corrected standard in developing its rule.

The lower court similarly remanded the rule to the agency for revision in accordance with a standard consistent with the nondelegation doctrine. However, it took a less intrusive path than that outlined in *Benzene*. It found only that, as applied, EPA's interpretation of CAA § 109 allows it untrammeled discretion that would, if not corrected, violate the nondelegation doctrine. But the court did not interpret the statute itself or tell the agency what the criteria must be under its terms. It merely held that, as interpreted by EPA, § 109 sets no limit on the agency's authority, and that under this view any level identified in the NAAQS would satisfy the CAA. Under the *Benzene* precedent, the reviewing court could have examined the statute for itself, determined its meaning (at least if it found that the intent of Congress was clear, see pp. 14-16 *infra*), and directed the agency to revise the rule in accordance with this interpretation (i.e., in a way that properly applied the reinterpreted "protect public health" with an "adequate margin of safety" test). Instead, the court below took the more limited step of remanding the matter to EPA with the direction that the agency reinterpret § 109 consistent with the nondelegation doctrine (if possible) and that under this revised understanding it identify a more specific foundation for setting the ozone and PM NAAQS.

C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*

The ruling below that EPA, rather than the reviewing court, should determine the meaning of § 109 consistent

with the nondelegation doctrine, is also required by recognized standards for judicial review of agency action. Under *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant EPA's regulation of "stationary sources" of pollution to be measured solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify criteria consistent with Congress' intent.

The identification of the numerical equivalent or degree of an "adequate margin of safety" for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue legislative rules such as NAAQS standards. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. *See Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements are inherently "arbitrary" and involve legislative judgments which agencies are better positioned than courts to make). EPA's interpretation shall be upheld if reasonable, including therein that as interpreted the statute satisfies the nondelegation doctrine.

Enforcement of the nondelegation doctrine, to require that the NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with sound policy. Not only are agencies quasi-legislative bodies and accountable to the people through the President's authority over them, but also EPA is the body best positioned to determine what Congress intended when it approved the provisions of § 109. 467 U.S. at 865-66. In addition, under *Chevron*, the agency interpretation is not "carved in stone" and can be modified as necessary to meet changing circum-

stances. It has greater flexibility and can move more quickly to revise the interpretation of the underlying criteria when change is required. And as long as that change is plausible and justified by reasons for the change, it will not be disturbed on judicial review. *Id.* at 863-64.

IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Finally, review of agency action under the "arbitrary and capricious" test under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is no substitute for application of the nondelegation doctrine to control standardless discretion. The nondelegation doctrine, as applied by the court of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect the public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent confines administrative discretion within understandable bounds, it will not be disturbed by the nondelegation doctrine on review. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109—it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence before the agency, and the inferences drawn from them as well as the policy rationale and ultimate conclusions must be adequately explained and justified. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, the arbitrary and capricious test does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decision making. Thus, the two requirements complement each other; but one is not a substitute for the other.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied and, alternatively, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

March 14, 2000

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
MAR 20
CLERK

Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

---

BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
FRANK J. REED, JR.
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

22pp

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES..... iii

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS.....2

A. This Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue. 4

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS. 8

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.....9

CONCLUSION.....14

TABLE OF AUTHORITIES

Page

CASES

American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981).....10

American Petroleum Inst. v. U.S. EPA, 52 F.3d 1113 (D.C. Cir. 1995).....10

American Trucking Associations, Inc. v. U.S. EPA, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999).....1

Ashwander v. TVA, 297 U.S. 288 (1936).....4

Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984).....7

Ethyl Corp. v. U.S. EPA, 51 F.3d 1053 (D.C. Cir. 1995).....11

George E. Warren Corp. v. U.S. EPA, 159 F.3d 616 (D.C. Cir. 1998).....11

Gomez v. United States, 490 U.S. 858 (1989).....4

Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (D.C. Cir. 1998).....11

Lead Industries Ass'n. v. U.S. EPA, 647 F.2d 1130 (D.C. Cir. 1980).....passim

Michigan Department of Environmental Quality v. U.S. EPA, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000).....passim

Natural Resources Defense Council v. U.S. EPA, 824 F.2d 1146 (D.C. Cir.1987) .....passim

TABLE OF AUTHORITIES - Continued

Page

Natural Resources Defense Council v. U.S. EPA, 902 F.2d 962 (D. C. Cir.1990) 10
Natural Resources Defense Council v. U.S. EPA, 937 F.2d 641 (D.C. Cir. 1991) 11, 12
Union Electric Co. v. U.S. EPA, 427 U.S. 246 (1976).....10

STATUTES

Clean Air Act §107; 42 U.S.C. 7407 8
Clean Air Act §108(b); 42 U.S.C. 7408(b).....8
Clean Air Act, §109(b); 42 U.S.C. 7409(b).....passim
Clean Air Act, §109(b)(1); 42 U.S.C. 7409(b)(1) 2, 7, 9
Clean Air Act §110; 42 U.S.C. 7410 8
Clean Air Act §112; 42 U.S.C. 7412 11
Clean Air Act §211; 42 U.S.C. 7545 11
Clean Air Act §307(b)(1); 42 U.S.C. 7607(b)(1) 2, 7
Clean Air Act §307(d)(1); 42 U.S.C. 7607(d)(1) 7
Clean Air Act §307(s); 42 U.S.C. 7607(s) 7

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGISTER

62 *Fed. Reg.* at 38,688 (July 18, 1997).....4
62 *Fed. Reg.* at 38,883 (July 18, 1997).....4
62 *Fed. Reg.* at 38,863/3 (July 18, 1997).....5

MISCELLANEOUS

Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995) Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.....4

Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

---

[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment*. 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms, is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
FRANK J. REED, JR.
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Next Page]

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

Supreme Court, U.S.
FILED
MAR 21 2000
CLERK

(8) (7) (6) (2) (4) (3)

Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

---

BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
FRANK J. REED, JR.
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

23pp

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION 3

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION 3

A. This Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.. 4

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 8

American Trucking Ass'ns, Inc. v. U.S. EPA, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999) 1

Bennett v. Spear, 520 U.S. 154 (1997) 5, 6

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 11

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) 6

Ciba-Geigy Corp. v. U.S. EPA, 801 F.2d 430 (D.C. Cir. 1986) 8

Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta, 458 U.S. 141 & n.13 (1982) 7

Her Majesty the Queen ex rel. Ontario v. EPA, 912 F.2d 1525 (D.C. Cir. 1990) 7

Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior, 180 F.3d 1192 (10th Cir. 1999) 8

Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983) 9

Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970) 6

Rail Reorganization Act Cases, 419 U.S. 102 (1974) 9

TABLE OF AUTHORITIES - Continued

Page

Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n, 178 F.3d 533 (D.C. Cir. 1999) 8
Western Ill. Home Health Care, Inc. v. Herman, 150 F.3d 659 (7th Cir. 1998) 8

STATUTES

Clean Air Act §107(d); 42 U.S.C. 7407(d) 7, 10
Clean Air Act §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B) 7
Clean Air Act, §109 42 U.S.C. 7409 1
Clean Air Act §110; 42 U.S.C. 7410 ..... 1, 5
Clean Air Act; 42 U.S.C. 7511-7511f 2
Clean Air Act §172(a)(1); 42 U.S.C. 7502(a)(1) 7
Clean Air Act §172(b); 42 U.S.C. 7502(b) 8
Clean Air Act §181(a); 42 U.S.C. 7511(a) 10
Clean Air Act §181(b); 42 U.S.C. 7511(b) 13
Clean Air Act §182; 42 U.S.C. 7511a 12
Clean Air Act §182(c)(9); 42 U.S.C. 7511a(c)(9) 13

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §182(d); 42 U.S.C. 7511a(d) 13
Clean Air Act §182(e); 42 U.S.C. 7511a(e) 13
Clean Air Act §307; 42 U.S.C. 7607 5
Clean Air Act §307(b)(1); 42 U.S.C. 7607(b)(1) 5

FEDERAL REGISTER

62 *Fed. Reg.* at 38,873 (July 18, 1997) 6
62 *Fed. Reg.* at 60,318, 60,323 (July 18, 1997) 14
63 *Fed. Reg.* at 2,726, 2,762, 2,778 (January 16, 1998) 14

MISCELLANEOUS

H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74 11
I Legislative History of the Clean Air Act Amendments of 1990 at 1236 12

STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.*
> After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

---

[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
FRANK J. REED, JR.
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Next Page]

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

Supreme Court, U.S.
FILED
MAR 2 6 2000
CLERK

Nos. 99-1257, 99-1265

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

RESPONSE OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attorneys General, New Jersey
Richard J. Hughes Justice Complex, 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

LISA HEINZERLING
Counsel of Record
Special Assistant Attorney General, Massachusetts
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

EDWARD G. BOHLEN
Assistant Attorney General, Massachusetts
200 Portland Street
Boston, MA 02114
(617) 727-2200, Ext. 3358

2pp

RESPONSE OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR CERTIORARI BY THE SOLICITOR GENERAL AND THE AMERICAN LUNG ASSOCIATION

Respondents Massachusetts and New Jersey support the petitions of the Solicitor General and the American Lung Association for a writ of certiorari to review the court of appeals' rulings with respect to the nondelegation doctrine and the implementation of the new eight-hour national ambient air quality standards for ozone. Respondents have filed their own petition for certiorari concerning those rulings. *Commonwealth of Massachusetts v. American Trucking Assns.*, No. 99-1263.

Respectfully submitted,

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attorneys General,
New Jersey
Richard J. Hughes Justice
Complex, 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

LISA HEINZERLING
Counsel of Record
Special Assistant Attorney
General, Massachusetts
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

EDWARD G. BOHLEN
Assistant Attorney General,
Massachusetts
200 Portland Street
Boston, MA 02114
(617) 727-2200, Ext. 3358

Supreme Court, U.S.
FILED
MAR 28 2000
CLERK

Nos. 99-1257, 99-1263, 99-1265

IN THE
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR RESPONDENTS NATIONAL STONE ASSOCIATION AND KENNECOTT HOLDINGS CORPORATION, *ET AL.*

MARCELLE SHOOP
Associate General Counsel
KENNECOTT
8315 West 3595 South
P.O. Box 6001
Magna, Utah 84044-6001
(801) 252-3553

KURT E. BLASE
(Counsel of Record)
MICHAEL D. WHATLEY
KILPATRICK STOCKTON LLP
700 13th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-5800

March 28, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

15pp

PARTIES TO THE PROCEEDINGS

This Brief is filed on behalf of Respondents National Stone Association, Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company. These Respondents were Petitioners in the consolidated cases addressed by the Petitions for a Writ of Certiorari to which this Brief responds, *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases). A complete list of the other parties to the proceedings below is provided in the Brief in Response for the Respondents Appalachian Power Co., et al.

RULE 29.6 DISCLOSURE STATEMENT

1. Respondent National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates industry. NSA has not issued shares or debt securities to the public. NSA includes over 700 member companies, which account for approximately 90% of the annual U.S. production of crushed stone and approximately 70% of U.S. sand and gravel production.

2. Respondents Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company have not issued shares or debt securities to the public.

3. Rio Tinto plc, the indirect parent of the Kennecott companies listed above, is a company incorporated under the laws of the United Kingdom, whose shares are publicly traded in the United States in the form of American Depository Receipts. The principal market for Rio Tinto PLC ordinary shares is the London Stock Exchange, with ordinary shares also listed on the Amsterdam, Brussels, Frankfurt, Paris and Swiss Exchanges. Rio Tinto's principal business is mining.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	1
RULE 29.6 DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
I. THE FINE PARTICLE RECORD AMPLY SUPPORTS THE "NONDELEGATION" HOLDING	1
II. THE "NONDELEGATION" HOLDING IS SUPPORTED BY THE GOVERNING STATUTE AND THE DECISIONS OF THIS COURT	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981) 5
American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 8
American Trucking Associations, Inc. v. EPA, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999) 1
Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 1
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) 5
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. —— (2000) 1
Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 5
Kennecott Copper Corp. v. EPA, 462 F.2d 486 (D.C. Cir. 1972) 5
Lead Industries Association, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 5
Mistretta v. United States, 488 U.S. 361 (1989) 8
Nebbia v. New York, 291 U.S. 502 (1934) 8
NRDC v. EPA, 902 F.2d 962 (D.C. Cir. 1990) 5

STATUTES

Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9) 7
5 U.S.C. § 706(2) 8
Pub. L. 105-178, 112 Stat. 463 (1990) 2

FEDERAL REGISTER

62 Fed. Reg. 38,421 (July 18, 1997) 2
62 Fed. Reg. 38,655 (July 18, 1997) 1
62 Fed. Reg. 38,656 (July 18, 1997) 2
62 Fed. Reg. 38,665 (July 18, 1997) 4
62 Fed. Reg. 38,674 (July 18, 1997) 2

LEGISLATIVE HISTORY

H.R. Rep. No. 95-294 (1977) 4, 5, 8
H.R. Rep. No. 95-564 (1977) 5

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

Abt Associates, "A Particulate Matter Risk Analysis for Philadelphia and Los Angeles," prepared for U.S. EPA, OAQPS, pp. 129-136 (July 3, 1996), EPA Docket No. A-95-54, R.Doc.II-A-11 3
Brief for Respondent United States Environmental Protection Agency at 75, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440 and consolidated cases) (filed August 5, 1998) 4
Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Hon. Carol M. Browner (June 13, 1996), PMJA 3167 3

INTRODUCTION

This Brief responds to the various Petitions for a Writ of Certiorari on portions of the Court of Appeals' decision in *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). These Respondents are interested primarily in the "nondelegation" decision below with respect to the national ambient air quality standards for fine particulate matter (PM-2.5). They concur generally in the Brief filed by Respondents Appalachian Power Co., et al., and join those Respondents in urging the Court to deny certiorari on the "nondelegation" issue and others presented in this case. The purpose of this Brief is to provide the Court with additional legal and factual support for the decision of the Court of Appeals with respect to the fine particle standards.[1]

I. THE FINE PARTICLE RECORD AMPLY SUPPORTS THE "NONDELEGATION" HOLDING

In EPA's Petition, the brief discussions of the basis for the fine particle standards focus exclusively on the agency's decision that the prior standards did not provide adequate protection. EPA Pet. 5, 11. Even that decision was subject to considerable scientific uncertainty, as EPA discussed in the preamble to the final rules.[2] Beyond that,

---

[1] In the decision on rehearing below, the Court of Appeals indicated that it would defer to EPA's response to the "nondelegation" holding under this Court's opinion in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA App. 75a-76a. Respondents note this Court's recent confirmation that under *Chevron*, the first inquiry is whether Congress has spoken to the question at issue; if so, the court must effect the unambiguous intent of Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. —— (2000). As discussed below, Congress has expressed its intent unambiguously in this case; EPA simply failed to follow it.

[2] *See* 62 Fed. Reg. 38,655-657 (1997). The agency's scientific advisers found that the relevant studies "provide ample reason to be concerned," but also urged that the studies "should be interpreted cautiously" as a result of the various uncertainties (62 Fed.

however, the effect of the scientific uncertainties was greatly magnified in the subsequent decision as to the level at which the new standards would be set. At that point, it was simply not possible to choose the concentration levels based on the science alone. Faced with widespread scientific uncertainty, EPA not only failed to articulate an intelligible principle to govern its decision, but expressly rejected the principle that Congress intended to be applied.

EPA's discussion of the concentration levels for the fine particle standards is a remarkable combination of rejected options and conclusory explanations for the chosen approach.[3] In attempting to justify the chosen standards, EPA stated that the agency:

- sought "the requisite reduction of risk;"
- made "decisions on standard levels that would reduce risk sufficiently to protect public health with an adequate margin of safety;"
- adopted a "balanced view of the strengths and uncertainties of the scientific information that reflects the intermediate approach;"
- "accurately reflected the bases for divergent views;"
- rejected fine particle protection equivalent to the prior PM-10 protection;

Reg. 38,656, col. 3). Accordingly, the Administration delayed implementation until after the first five-year review of the standards, in the hope that pending research would provide some answers. *See* 62 Fed. Reg. 38,421 (1997) (Presidential Memorandum). Congress ultimately ratified the President's decision. *See* Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a. Thus, EPA's assertion that the decision below "unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels" seems somewhat disingenuous. EPA Pet. 11.

[3] The following bullets and quotations are taken from the agency's discussion of the concentration levels at 62 Fed. Reg. 38,674-677 (1997).

- rejected "uncertain ratios" to the prior PM-10 standards;
- opted for "appropriately protective" standards;
- acknowledged great "scientific uncertainties" in the available health studies;
- considered the combined effects of the annual and 24-hour standards, the cumulative scientific uncertainties, the levels recommended by EPA staff and the science advisors, and public comments.

Yet nowhere, throughout this entire lengthy and complex explanation, is there *any* discussion whatsoever of the level of "risk reduction" that is "requisite," the level of protection that is "appropriate" or the criteria to be used in making these decisions in the face of extremely uncertain health studies.

There was no consensus among the agency's science advisors on these questions, given "the many unanswered questions and uncertainties . . ." [4] The scientific data gaps also were demonstrated clearly in the agency's unsuccessful attempts to prepare a reliable quantitative risk assessment for the standards. When entered into various risk assessment models, the data available from the underlying health studies were simply not sufficient to support a robust and reasonably reliable estimate of the risk reduction—if any—that the new standards would provide.[5] As a computer data analyst might say, "garbage in, garbage

[4] Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Hon. Carol M. Browner (June 18, 1996), PMJA 3167.

[5] For a detailed discussion of the uncertainties inherent in the risk assessment, see Abt Associates, "A Particulate Matter Risk Analysis for Philadelphia and Los Angeles," prepared for U.S. EPA, OAQPS, pp. 129-136 (July 3, 1996). EPA Docket No. A-95-54, R.Doc.II-A-11.

out." In the final analysis, EPA did not place "great weight" on the various risk assessments, concluding that they "include significant uncertainty and, therefore, should not be viewed as demonstrated health impacts." [6] Leaving no doubt as to the minimal role of risk assessment in EPA's decision, EPA's Opening Brief in the Court of Appeals stated:

> [T]he risk assessment was not a "central justification" of the PM-2.5 levels . . . Indeed, EPA cautioned against using the risk assessment in this case as a precise measure of risk due to the limitations and uncertainties in the current state of the evidence. Thus, the risk assessment was not "central" to EPA's quantitative task of selecting the PM-2.5 levels.[7]

Denied the essential tool of a reliable risk assessment, EPA simply gazed into its crystal ball and picked a number somewhere in between the various diverging views.

This is precisely the approach to ambient standards that Congress and the courts have sought to prevent. In amending the standard-setting provisions in the Clean Air Act in 1977, Congress intended for EPA to assess risk, but also cautioned:

> [o]n the other hand, the committee does not intend this language as a license for "crystal ball" speculation. The Administrator's judgment must of course, remain subject to restraints of reasoned decisionmaking.[8]

---

[6] 63 Fed. Reg. 38,665 (col. 1), 38,656 (col. 2) (1997).

[7] Brief for Respondent United States Environmental Protection Agency at 75, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440 and consolidated cases) (filed August 5, 1998).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 51 (1977) (hereinafter "1977 Houe Rept."). The approach adopted by the House Committee eventually was accepted in conference and written into the Act. *See* H.R. Rep. 564, 95th Cong., 1st Sess. 184 (1977) (Conference Report); *see also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding sulfur oxides secondary standard "for the Administrator to . . . enlighten the court as to the basis on which he reached the . . . standard from the material in the Criteria"); *accord, NRDC v. EPA*, 902 F.2d 962, 968, 971 (D.C. Cir. 1990) (court obligated to "carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence"); *Lead Industries Association v. EPA*, 647 F.2d 1130, 1146-47 (D.C. Cir. 1980) (factual conclusions capable of being drawn from the evidence in the record must be supported by "substantial evidence in the record considered as a whole"; where scientific knowledge insufficient to permit fully informed factual determinations, court "will indeed scrutinize such judgments carefully" and EPA must provide a reasoned explanation "calculated to negate the dangers of arbitrariness and irrationality"); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (same).

As a check on EPA's authority to adopt standards in the face of scientific uncertainty, Congress required the agency to demonstrate that standards are necessary to protect against significant public health risks. The House Committee expressly endorsed the opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976), which holds that EPA may set standards only when necessary to prevent "a significant risk of harm." [9] In several places, the House Report makes it clear that standards are to address only "significant risk," not *any* risk.[10]

Further, this Court has indicated that the inability to justify public health regulation through scientifically sound quantitative risk assessment poses serious constitutional problems. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"), the Court rejected an OSHA attempt to establish a health standard for benzene without demonstrating that

---

[9] *See* 1977 House Rept. at 43.

[10] See, e.g., 1977 House Rept. at 43, 45, 46, 47, 48.

the standard was necessary to protect against "a significant risk of harm" (448 U.S at 645). The Court noted that in the absence of a clear statutory mandate, it is unreasonable to assume that Congress intended to grant OSHA the "unprecedented power over American industry" conferred by regulation in the absence of a requirement to demonstrate significant risk (*id.*) The court also explained that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit" (448 U.S. at 645). The Court then stated:

> [i]f the Government was correct in arguing that neither [applicable statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be avoided (448 U.S. at 646).

This case presents precisely the same scenario. Key scientific uncertainties made it impossible to quantify potential risk sufficiently to characterize it as significant for purposes of choosing the fine particle concentration limits. As a result, EPA was forced to abandon the "intelligible principle" of regulation based on significant risk, resorting to an arbitrary selection of standards from among widely divergent scientific views. No criteria for choosing a standard in the face of this scientific uncertainty were articulated, nor was any other rational basis provided for the numbers that EPA picked. In a reaction similar to this Court's decision in *Benzene*, the Court of Appeals found EPA's approach so arbitrary as to render

the underlying delegation of legislative authority unconstitutional. The court's holding is amply supported by the fine particle record. It is also fully consistent with the governing statute and the relevant decisions of this Court, for reasons to which we now turn.

II. THE "NONDELEGATION" HOLDING IS SUPPORTED BY THE GOVERNING STATUTE AND THE DECISIONS OF THIS COURT

EPA argues that the decision of the Court of Appeals "would unjustifiably expand the role of the courts in reviewing agency action," and "would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard." EPA Pet. 9, 17. But these arguments focus on only one part of the applicable standard of review. Clean Air Act Section 307(d)(9) (42 U.S.C. § 7607(d)(9)), which governs judicial review in this case, provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
>
> (D) without observance of procedure required by law . . . (emphasis added).

Far from assuming an unjustifiably expanded role, the court was fulfilling exactly the role that Congress intended.[11] In the view of these Respondents, the rule-

---

[11] In adopting the 1977 standard-setting amendments, Congress was careful "to provide for adequate judicial review of the reasonableness of the Administrator's judgment in assessing risks,"

making record would have supported a remand of the fine particle standards under any of at least the first three provisions of this standard. The fact that the court chose to base its holding on constitutional grounds simply underscores the extremely arbitrary nature of EPA's decision.

Nor is there any basis for EPA's assertions that the court's ruling conflicts with this Court's nondelegation decisions. As discussed above, the court's ruling is fully consistent with this Court's decision in *Benzene*.[12] Further, EPA's argument that the starting point for a nondelegation analysis should be the statutory language, purpose and history is precisely the point. EPA Pet. 12. As this Court has noted, agencies are to "derive meaningful content" from these factors, which provide "a veritable code of rules . . . for the [agency] to follow in giving effect to [the statute]. *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946). Judicial review "safeguards against statutory or constitutional excesses," and "all that can be required is that the [agency's] actions conform to the statutory language and policy" (329 U.S. at 106). But where—as here—the agency expressly rejects the "intelligible principle" provided by Congress to govern its decision, and fails to provide a reasonable explanation of how it applied the statute and the underlying policy to derive the standards it chose, the effect is to create an

---

in the form of the judicial review provision in Section 307(d). 1977 House Rept. at 50. The same statutory language appears in the judicial review provision of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2) (1999). Indeed, the "arbitrary and capricious" standard itself finds its roots in the Due Process Clause. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934).

[12] *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (citing *Benzene*) (cases since the Depression confined to "giving narrow interpretations to statutory delegations that might otherwise be thought to be unconstitutional").

unconstitutional delegation. That is all the Court of Appeals held in this case, and its holding is amply justified by the fine particle record and the applicable legal principles expressed by this Court.

CONCLUSION

Congress directed EPA to base ambient air quality standards on significant public health risks. This Court has held that in such cases, the inability to quantify potential risk sufficiently to characterize it as significant raises serious constitutional concerns under the "nondelegation" doctrine. Unable to quantify potential risk owing to severe scientific deficiencies, EPA chose to reject these principles and establish fine particle standards without articulating any other governing criterion. The Court of Appeals found EPA's approach so arbitrary as to effect an unconstitutional delegation of legislative authority. The court's decision is entirely consistent with the record in decisions of this Court. The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

MARCELLE SHOOP
Associate General Counsel
KENNECOTT
8315 West 3595 South
P.O. Box 6001
Magna, Utah 84044-6001
(801) 252-3553

KURT E. BLASE
(Counsel of Record)
MICHAEL D. WHATLEY
KILPATRICK STOCKTON LLP
700 13th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 508-5800

March 28, 2000

Supreme Court, U.S.
FILED
APR 12 2000
CLERK

(14) (12) (12)
Nos. 99-1257, 99-1263, 99-1265,
99-1426, 99-1431, 99-1442
(5) (5) (5)

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,
Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for American Lung Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36pp

QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

TABLE OF CONTENTS

Page

CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 1

ARGUMENT 2

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE 4

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors 4

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Nondelegation Issue 9

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI 11

TABLE OF CONTENTS – Continued

Page

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS 14

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE 24

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 12

American Petroleum Institute v. Costle, 665 F.2d 1176 (D.C. Cir. 1981) 12

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 8

American Textile Manufacturers Inst. v. Donovan, 452 U.S. 490 (1981) 6, 7

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 1, 12

Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) 16

FDA v. Brown & Williamson Tobacco Corp., U.S. Supreme Court No. 98-1152 (March 21, 2000) .. 12, 13

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 6

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 10

Jones v. United States, 119 S. Ct. 2090 (1999) 26

Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 11

Lichter v. United States, 334 U.S. 742 (1948) 6

Mistretta v. United States, 488 U.S. 361 (1989) 5, 6, 7

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 6

TABLE OF AUTHORITIES – Continued

Page

Natl. Cable Television v. United States, 415 U.S. 336 (1974) 10, 11

Natural Resources Defense Council v. Administrator, 902 F.2d 962 (D.C. Cir. 1990) 12

Natural Resources Defense Council v. USEPA, 824 F.2d 1146 (D.C. Cir. 1987) 12

Union Electric Co. v. USEPA, 427 U.S. 246 (1976) 12, 16, 20

Yakus v. United States, 321 U.S. 414 (1944) 6

STATUTES

1967 Clean Air Act § 107, 1967 U.S. Code Cong. & Ad. News 522 17

1967 Clean Air Act § 108, 1967 U.S. Code Cong. & Ad. News 523 ..... 17, 18

1970 Clean Air Act § 110, 1970 U.S. Code Cong. & Ad. News 1959 15

1970 Clean Air Act § 111, 1970 U.S. Code Cong. & Ad. News 1963 15

1970 Clean Air Act § 113, 1970 U.S. Code Cong. & Ad. News 1966 20

1970 Clean Air Act § 231, 1970 U.S. Code Cong. & Ad. News 1989 16

1970 Clean Air Act § 312, *reprinted in* 1977 Legislative History at 7431 15

Clean Air Act § 108, 42 U.S.C. § 7408 ..... *passim*

Clean Air Act § 109, 42 U.S.C. § 7409 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Clean Air Act § 112, 42 U.S.C. § 7412 23

Clean Air Act § 317, 42 U.S.C. § 7617 23

Pub. L. 95-95, § 129, 91 Stat. 746-47 (August 7, 1977) 22

Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) 22

LEGISLATIVE HISTORY

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972) 21

S. Rep. 1196, 91st Cong., 2d Sess. (1970) 19

H.R. Rep. 294, 95th Cong., 1st Sess. (1977) 22

116 Cong. Rec. 19224 (June 10, 1970) 20

116 Cong. Rec. 32901 (September 21, 1970) 20

FEDERAL REGISTER

36 Fed. Reg. 8186 (April 30, 1971) 11

62 Fed. Reg. 38652 (July 18, 1997) 1, 11

62 Fed. Reg. 38856 (July 18, 1997) 1, 25

COURT RULES

Sup. Ct. R. 14.1 24

CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

---

[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Non-delegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*," *id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) (*"Vinyl Chloride"*); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

---

[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

---

[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Attorney for American Lung Association

[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

Supreme Court, U.S.
FILED
APR 12 2000
CLERK

(13)

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

12 pp

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir. 1980)	5
Statutes, regulations and rule:	
Clean Air Act, 42 U.S.C. 7401 *et seq.*:	
§ 109, 42 U.S.C. 7409	2, 3
§§ 181-185B, 42 U.S.C.. 7511-7511f	6
§ 307, 42 U.S.C. 7607	9
§ 307(b), 42 U.S.C. 7607(b)	9
40 C.F.R.:	
Section 50.7	7
Section 50.9	8
Section 50.9(b)	7, 8, 9
Section 50.10	7, 8, 9
Fed. R. App. P. 35(a)	2
Miscellaneous:	
62 Fed. Reg. 38,856 (1997):	
p. 38,873	8
pp. 38,884-38,885	7
64 Fed. Reg. 57,424 (1999)	8

In the Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF
THE ENVIRONMENTAL PROTECTION AGENCY,
ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The federal government's petition for a writ of certiorari has prompted an extraordinary array of responses. The Commonwealth of Massachusetts and the State of New Jersey (which have filed their own joint petition, No. 99-1263 (Mass. Pet.)) and the American Lung Association (which has filed its own petition, No. 99-1265 (ALA Pet.)) fully endorse the government's petition. Likewise, the States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont, as amici curiae (Eastern States Am. Br.), unqualifiedly support review. The State of Ohio does not oppose review of the nondelegation issue, while the States of Michigan and West Virginia support review to the extent urged by the American Trucking Associations, *et al.* (Midwest States Br. 3). The American Trucking Associations, *et al.*, which consists of a group of

industrial interests, says that "[a] properly reformulated version of the Government's first question is worthy of review" (ATA Br. 1; see also Mfrs. Alliance Am. Br. 17). Appalachian Power Co., *et. al.* (APC) and the National Stone Association, *et al.* (NSA), which represent other industrial interests, and the Mercatus Center, an academic organization, oppose review.

As these wide-ranging responses suggest, the court of appeals has decided an extraordinarily important matter. The court ruled that Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by EPA in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (PM), effects an unconstitutional delegation of legislative authority. Pet. App. 4a. In addition, the court has reached out to decide matters not yet before it and ruled that EPA may enforce the revised ozone NAAQS only "in conformity with" CAA provisions that were enacted to serve a different purpose. *Id.* at 81a. The responses to the government's petition leave no doubt that the challenged rulings, which divided the court of appeals, have great practical importance to the federal and state governments, industry, and the public at large. But of equal moment, those rulings present fundamental issues respecting the power of federal courts and the scope of judicial review. This case clearly warrants the Court's review.

1. The majority of responses to the government's petition agree that this Court should review the nondelegation ruling. That ruling deeply divided the court of appeals—five of the nine judges who participated in the en banc poll voted *in favor* of en banc review. Those judges not only concluded that the ruling raised a question of exceptional importance, see Fed. R. App. P. 35(a), but also condemned the ruling in strong terms, calling it "fundamentally unsound," Pet. App. 92a (Silberman, J., dissenting from denial of rehearing en banc), and a "depart[ure] from a half century of separation-of-powers jurisprudence," *id.* at 99a (Tatel, J., dissenting

from denial of rehearing en banc). Correspondingly, the suggestions by those who oppose review that the court of appeals' decision is actually "unexceptional," "pedestrian" and presents "nothing remarkable" (APC Br. 11, 13, 14) warrant some skepticism.

Although the industrial groups criticize the government rulemaking (and offer less-than-balanced depictions of the government's decision and the rulemaking record, *e.g.*, APC Br. 4-5, 12; ATA Br. 4-7), neither they nor their amici attempt to defend the court of appeals' decision on its own terms. For example, ATA suggests that "a properly reformulated version of the Government's first question"—presumably, as ATA stated it (ATA Br. i)—would be "worthy of this Court's review." *Id.* at 1. But the government's formulation of the question presented (Pet. I) is a virtual paraphrase of the court of appeals' express holding. The court stated, "we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power." Pet. App. 4a. ATA's preferred formulation, by contrast, avoids any mention of the court of appeals' nondelegation rationale. See ATA Br. i; see also Midwest States Br. i; APC Br. i.

There is good reason why respondents are unwilling to defend the court of appeals' holding—that holding is indeed "fundamentally unsound." Pet. App. 92a (Silberman, J., dissenting from denial of rehearing en banc). ATA concedes, and APC does not question, that the CAA "itself" is constitutional. ATA Br. 15 (Section 109 is "undisputedly" constitutional); APC Br. 8 ("The court did *not* hold the statute itself unconstitutional."). To suggest otherwise would truly "depart from a half century of separation-of-powers jurisprudence." Pet. App. 99a (Tatel, J., dissenting from denial of rehearing en banc). But ATA and APC must then face the quandary of explaining how, under the nondelegation doc-

trine, an agency could make an "undisputedly" constitutional statute unconstitutional.

APC and ATA ultimately defend the court of appeals' decision by recharacterizing it. APC suggests that "the constitutional 'nondelegation' rationale for remand in this case might as well have been articulated as 'arbitrary and capricious' agency action" and that the Court should be satisfied with the end result here "[w]hatever the rationale." APC Br. 12, 13 (footnote omitted). ATA argues that the court merely applied "constitutional avoidance and nondelegation principles" as canons of statutory construction and produced an outcome that is "functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron* [*U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)]." ATA Br. 10, 14. Those salvage efforts are unavailing.

Contrary to APC's and ATA's suggestions, the rationale of the court of appeals' decision *does* matter. The nondelegation doctrine, the arbitrary-and-capricious standard, and the *Chevron* doctrine each serve a different purpose. They are not interchangeable, and substituting one for the other ignores the logic and diminishes the utility of each. See Pet. 16-17; Pet. App. 94a-96a (Silberman, J., dissenting from rehearing en banc). Moreover, even if rationales were of no moment, the court of appeals' ruling cannot be sustained on either of the bases that APC and ATA suggest.

It is quite clear from the court of appeals' decision that the panel majority did not equate its constitutional analysis with review under the "arbitrary and capricious" standard. The court of appeals noted it had repeatedly held, *under the arbitrary and capricious standard*, that

> when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 902 F.2d 962, 969 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries [Ass'n* v. *EPA*, 647 F.2d 1130,] 1161 (D.C. Cir. 1980).

Pet. App. 12a. The court imposed a *constitutional* requirement *beyond* what the arbitrary and capricious standard would call for—namely, a "determinate criterion for drawing lines" (*id.* at 6a)—because, in the court's view, "none of those panels [in the previous cases] addressed the claim of undue delegation that we face here." *Id.* at 12a. Plainly, the court ruled that the nondelegation doctrine imposes constitutional imperatives *in addition to* the requirements of the arbitrary and capricious standard. That holding also explains why the court found that it had to postpone a full review of the NAAQS under the arbitrary and capricious standard. *Id.* at 5a.

It is also quite clear that the court of appeals did not employ nondelegation principles merely as a "construction canon[]" (ATA Br. 10) to avoid a constitutional issue. ATA claims that the court "reject[ed] EPA's interpretation under *Chevron*" (*ibid.*), but the panel majority's discussion does not even mention the *Chevron* doctrine, and the panel's opinion on rehearing does so only as an epilogue, suggesting that the agency has discretion on remand to satisfy the court's nondelegation requirement. Pet. App. 75a-76a. Indeed, the panel specifically disclaimed departing from the relevant circuit precedent upholding EPA's interpretive discretion. See Pet. 10 n.4. But more fundamentally, ATA's argument is logically inconsistent. If the relevant provisions of the CAA are "undisputedly" constitutional (ATA Br. 15)—and they are, see Pet. 11-16—then there is no need for a court to invoke the nondelegation doctrine to "avoid" a constitutional issue. The issue before the court of appeals was whether the

agency misinterpreted the CAA or unreasonably exercised the discretion conferred by the CAA. The nondelegation doctrine has no bearing on *those* questions.

In short, APC's and ATA's arguments highlight why the court of appeals' analysis is indefensible. Furthermore, they provide a preview of the Pandora's Box of doctrinal issues that will emerge if the decision is left uncorrected. The Court should therefore grant the government's petition, make clear that the nondelegation doctrine should be confined to its proper role as a separation-of-powers constraint on *Congress*, and remand the case for the court of appeals to analyze the statutory and regulatory issues under the correct legal standards. See Pet. 16-17.

2. APC, ATA, and the Midwest States argue that this Court should not review the court of appeals' further ruling that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. As we explain in our petition, Subpart 2 of Part D, Subchapter I of the CAA, 42 U.S.C. 7511-7511f, provides a detailed statutory scheme, including attainment deadlines, for implementing the ozone NAAQS standard that was in effect in 1990. Pet. 4-5, 26. But Subpart 2 does not unambiguously address how to implement the revised ozone standards, which will necessarily require different attainment deadlines and implementation schedules. Pet. 27-29 & n.16; see also Mass. Pet. 5-8, 21-25. The question of how to implement the revised ozone NAAQS should be a matter for EPA and the States to address through authoritative rules that are subject to notice, comment, and judicial review. EPA has not yet conducted those rulemakings, and there was accordingly no occasion for the court of appeals to make broad pronouncements limiting EPA's authority to implement the revised ozone NAAQS. Pet. 19-30.

APC's and ATA's defense of the court of appeals' action demonstrates why the matter warrants this Court's review. They assert that the court of appeals reviewed final and ripe

agency action, but the two sources of supposedly final agency action on which they rely are: (1) EPA's preamble statements responding to industry comments that Subpart 2 provisions *bar* revision of the NAAQS; and (2) a final rule that was *not at issue* in the judicial proceedings below. See APC Br. 22-23; ATA Br. 6, 24, 27-28. If judicial review could be predicated on such bases, there would be an enormous expansion in unfocused challenges to agency regulatory programs and a corresponding expansion in the role of the courts in anticipating and supervising agency activities.

We explain in the petition why preamble statements generally—and especially the preamble statements that the court of appeals relied upon here (62 Fed. Reg. 38,856, 38,884-38,885 (1997))—do not constitute final agency action. Pet. 21-25. EPA has promulgated revised NAAQS that will be implemented through later rulemakings. See 40 C.F.R. 50.7 (revised PM NAAQS); 40 C.F.R. 50.10 (revised ozone NAAQS). Respondents were entitled to challenge the revised NAAQS, and they were entitled to take issue with EPA's reasoning, as expressed in the regulatory preamble, in making those challenges. But EPA's preamble statements are only the agency's explanation of the agency's action—they are not themselves agency actions that are independently reviewable. The court of appeals accordingly had jurisdiction to affirm, set aside or remand the NAAQS, but once it completed that task, it could not go further and decide other issues that were not yet before it. See Pet. 21-25.

In arguing that this rulemaking involves more, APC and ATA point to a rule that EPA issued in the ozone rulemaking, 40 C.F.R. 50.9(b), respecting future enforcement of the 1-hour ozone NAAQS, which the revised 8-hour ozone NAAQS will replace. See APC Br. 23; ATA Br. 27-28. That rule states:

> The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

40 C.F.R. 50.9(b). EPA issued that rule to relieve areas that are in compliance with the 1-hour ozone NAAQS from the obligation to comply with both the old 1-hour standard and the new 8-hour standard. See 62 Fed. Reg. at 38,873.[1]

APC characterizes 40 C.F.R. 50.9(b) (incorrectly, see note 2, *infra*) as an "embodi[ment]" of "EPA's legal conclusion" about how the revised ozone NAAQS should be implemented, and it argues that EPA's issuance of that rule therefore subjects "EPA's legal conclusion" to judicial review. APC Br. 23. Respondents fail to reveal, however, that *no one* challenged the validity of 40 C.F.R. 50.9(b), which was a minor component of the ozone rulemaking. The court of appeals did not review, or even mention, that rule. Hence, the rule was certainly not the actual predicate for the court of appeals' ruling.[2]

The court of appeals was entitled to rule on how "EPA can enforce a revised primary ozone NAAQS" (Pet. App. 81a) only if the parties had placed before the court a specific challenge to final agency action enforcing that NAAQS. No such challenge had been presented, and there accordingly was no basis for the court to address that question. Its overreaching cannot be justified by post hoc resort to the

---

[1] As a consequence of the court of appeal's decision, EPA has proposed a modification of 40 C.F.R. 50.9(b) to maintain the 1-hour standard in effect until the ongoing legal challenges are resolved. See 64 Fed. Reg. 57,424 (1999).

[2] An additional problem with respondents' argument is that 40 C.F.R. 50.9(b) is part of, and addresses enforcement of, the *old* ozone NAAQS. Compare 40 C.F.R. 50.9 with 40 C.F.R. 50.10. Accordingly, it is not accurate to characterize 40 C.F.R. 50.9(b) as implementing or enforcing the revised ozone NAAQS. The rule deals with only one aspect of the transition from the old ozone standard to the new ozone standard.

undiscussed implications of an unchallenged rule. That is particularly true where that rule merely addresses interim enforcement of the *pre-existing* NAAQS.[3]

APC's reliance on 40 C.F.R. 50.9(b) would make sense only if this Court accepted the contention that judicial review is available on an open-ended basis whenever the agency expresses a "legal conclusion" somewhere in the rulemaking proceeding. Under that view, the party would not be required to challenge the particular rule that allegedly "embodied" that conclusion—it would be enough for the party simply to take issue with the agency's general view of its regulatory authority. See APC Br. 23; see also ATA Br. 27-28. That approach to administrative finality and ripeness is clearly unsound. The CAA predicates judicial review on challenges to final agency action. See CAA § 307(b), 42 U.S.C. 7607(b). It does not give the courts unrestricted license to critique regulatory preambles or to review the general legal perspectives allegedly "embodied" in unchallenged regulations.

---

[3] Significantly, APC could have challenged 40 C.F.R. 50.9(b) in the proceedings below, and it should have if it disagreed with that rule. But APC did not do so because the rule is in industry's interest—the rule reduces the regulatory burden on ozone sources. Since that time, an environmental group has brought a challenge to 40 C.F.R. 50.9(b), and the government opposed that challenge because it was untimely. See *Environmental Defense Fund (EDF)* v. *Browner*, No. 98-1363 (D.C. Cir.). Contrary to APC's assertion (APC Br. 24), the government's position there is consistent with its position here. Any petitions to review 40 C.F.R. 50.9(b) should have been brought within 60 days of promulgation of the final rule. See 42 U.S.C. 7607. Neither EDF nor APC nor anyone else brought a timely judicial challenge to 40 C.F.R. 50.9(b). Rather, APC and others brought a timely judicial challenge to the revised ozone NAAQS, 40 C.F.R. 50.10. The latter challenge put before the court the question whether to affirm, invalidate, or remand the revised ozone NAAQS, but it did not entitle the court to address the subjects of future rulemaking—including how the revised ozone NAAQS would eventually be enforced.

This Court therefore should grant review on the Subpart 2 issues. In our view, the better course is to set aside on finality and ripeness grounds the court of appeals' ruling limiting what actions EPA may take in future rulemakings. But if the Court reaches the merits, there is ample reason to declare the ruling wrong as a matter of law. See Pet. 27-30; Mass. Pet. 21-25; ALA Pet. 24-26; Eastern States Am. Br. 6-11. This Court's resolution of the matter is warranted based on its practical importance to the federal government and the States. The Court's review takes on added importance in light of APC's incongruous interpretation of the court of appeals' obscure statement that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2" (Pet. App. 81a). In APC's view, that statement means that EPA can promulgate—but not enforce—a revised ozone NAAQS.[4]

For the foregoing reasons and the reasons stated in the petition for a writ of certiorari, the petition should be granted and consolidated with the petitions in No. 99-1263 and No. 99-1265.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

GARY S. GUZY
General Counsel
Environmental Protection Agency

APRIL 2000

---

[4] Notwithstanding the panel's revisions of its opinion (Pet. App. 79a-82a) and Judge Tatel's explanatory concurrence (*id.* at 89a), APC asserts that Subpart 2 "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." APC Br. 9, 28 (quoting panel opinion, emphasis supplied by APC). APC's interpretation of the court's ruling would transform the promulgation of that NAAQS and judicial review of its promulgation into largely academic exercises.

(15) (13) (13)

Nos. 99-1257, 99-1263, 99-1265

Supreme Court, U.S.
FILED
APR 17 2000
CLERK

In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attorneys General,
New Jersey
Richard J. Hughes Justice
Complex, 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of
Massachusetts

LISA HEINZERLING
Counsel of Record
Special Assistant Attorney
General, Massachusetts
Georgetown University
Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9115

EDWARD G. BOHLEN
Assistant Attorney General,
Massachusetts
200 Portland Street
Boston, MA 02114
(617) 727-2200, Ext. 3358

13pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF OF STATE PETITIONERS 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 3

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 6

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) . . . 2, 5, 6

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 4

United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) . . . 6

Statutory Provisions

42 U.S.C. § 7407(d) 8

42 U.S.C. § 7407(d)(4) 8

42 U.S.C. § 7511(a)(1) 7, 8

Pub. L. No. 105-178, § 6103, 112 Stat. 465 (1998) 8

Other Sources

H.R. Rep. No. 101-490, Pt. 1, at 229-232, *reprinted in* 2 1990 Legis. Hist. 3253-3256 9

REPLY BRIEF OF STATE PETITIONERS

This case concerns two separate rules issued by EPA with respect to two different pollutants: particulate matter and ozone. The court below invalidated both rules on the basis of the "nondelegation" doctrine. A large number of respondents concede that this deviant but important constitutional ruling warrants this Court's review. (Brief in Response for Respondents American Trucking Associations, *et al.*, 10 ("ATA Resp."); Brief in Response for States of Ohio, Michigan and West Virginia 3 ("Ohio Resp.").) However, one group of respondents avers that the lower court's invalidation of EPA's rules on the basis of a constitutional doctrine not used by this Court to overturn a statute in more than six decades is so "pedestrian" that it requires "no comment, let alone Supreme Court review." (Brief in Response for Appalachian Power Co., *et al.*, 24 ("App. Pwr. Resp.").) As set forth below, however, respondents premise this audacious claim on a mistaken reading of the opinion below, and on the implicit constitutionalization of basic principles of administrative law.

The court also held that the ozone standard could not be enforced. As to the question whether this ruling comports with the Clean Air Act, all respondents urge this Court to leave matters where they stand. But the two questions that petitioners have brought before this Court concerning the ozone standard – constitutional and statutory – should be heard together. Unless this Court grants review of the statutory question whether EPA may enforce the revised ozone standard, review of the constitutional question *as it applies to the ozone rule* may amount to a pointless exercise in abstraction. To avoid this eventuality, the Court should grant review of both questions, constitutional and statutory, presented by petitioners.

1. *The constitutionality of the Clean Air Act as applied to EPA's revised rules.*

The court below held that the "statutory language" of the Clean Air Act and the "existing agency interpretation" of that language "involve an unconstitutional delegation of power." (Appendix to State Petitioners' Petition for Certiorari 12 ("App.").) Many respondents, including the State of Ohio, concede that this remarkable constitutional ruling warrants this Court's review. (ATA Resp. 10; Ohio Resp. 3.) When the United States Government and States that are parties to a case collectively request this Court's review and when, moreover, a large contingent of industry parties acquiesces in that request, such a case comes to this Court with a heavy presumption that review is warranted.

Despite their sensible concession about the importance of this case, however, Respondents ATA, *et al.*, attempt to recast the decision below as a "work-a-day" remand under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (ATA Resp. 14.) Similarly, Respondents Appalachian Power, *et al.*, strain to fit the court's problematic constitutional decision into the familiar framework of "arbitrary and capricious" review under the Administrative Procedure Act and statutory interpretation under *Chevron* (App. Pwr. Resp. 12-13, 15.) Respondents National Stone Association, *et al.*, make a similar attempt. (Brief in Response for Respondents National Stone Association and Kennecott Holdings Corporation, *et al.*, 7-8 ("Nat'l Stone Resp.").) These efforts to domesticate the D.C. Circuit's bold ruling do not succeed.

Tellingly, none of the respondents defends the lower court's ruling that the "statutory language" of the Clean Air Act violates the nondelegation doctrine. (App. 12.) Instead, respondents seek to reassure this Court that the constitutional status of the Clean Air Act itself – which has been on the statute

books for three decades and has been the subject of numerous judicial challenges, including several in this Court – is secure. (App. Pwr. Resp. 8 ("The court did *not* hold the statute itself unconstitutional"); ATA Resp. 15 (statute "undisputedly is not" unconstitutional)). Presumably, respondents recognize that a failure to concede the constitutionality of the Clean Air Act would place their views at obvious odds with this Court's numerous precedents upholding far broader delegations against constitutional attack (discussed in our petition at 18-21). Thus, rather than acknowledging that the court below found that the "statutory language" of the Clean Air Act violated the nondelegation doctrine (App. 12), respondents repeatedly claim that the court found only that EPA's *interpretation* of the Act was unconstitutional.

But how does a statute that is "undisputedly" constitutional somehow *become* unconstitutional when interpreted by an administrative agency?

Respondents Appalachian Power, *et al.*, offer the most adventuresome answer to this question. Distancing themselves from the dubious constitutional grounding of the D.C. Circuit's opinion, these respondents implicitly equate the arbitrary and capricious standard of review with the constitutional doctrine of delegation. For example, respondents cite decisions based on the arbitrary and capricious standard as if those decisions support the D.C. Circuit's constitutional ruling. (See, e.g., App. Pwr. Resp. 17 (citing *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).) Even more bewilderingly, respondents also suggest that the D.C. Circuit's rationale for remanding EPA's rules

> might as well have been articulated as "arbitrary and capricious" agency action – that EPA failed to state a rational basis for its decision. *Whatever the rationale*, the

> proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review. (App. Pwr. Resp. 12-13 (footnotes omitted, emphasis added).)

See also Nat'l Stone Resp. at 7-8. Respondents' casual equation of the nondelegation doctrine with the arbitrary and capricious standard should not be countenanced.[1] Respondents'

---

[1]It is possible that the respondents, in the passage cited in text, are inartfully attempting to defend the court's judgment on the basis of an argument not reached by the court below. This Court should not decide the question whether EPA's rules are arbitrary and capricious. Addressing this question would require systematic, in-depth scrutiny of the voluminous record in this case. This complex and fact-bound issue should be considered in the first instance by the appeals court. Moreover, respondents did not present this argument in this same form below, and therefore the question whether EPA's rules are arbitrary and capricious in the way respondents now allege is not properly before this Court. With respect to particulate matter, for example, respondents did not argue to the lower court that EPA's revised particulate matter rule was arbitrary and capricious due to the agency's failure to explain why it targeted one pollutant level rather than another. Rather, respondents took issue with the scientific evidence underlying the revised standard, see Brief of Non-State Petitioners on Fine Particulate Matter NAAQS, and with EPA's failure to consider the effects of the rules on small businesses, see Brief of Small Business Petitioners and Intervenor (PM Rule). Likewise, with respect to the ozone standard, respondents challenged the scientific evidence underlying EPA's finding of an unacceptable risk to human health, but did not ask the court to require EPA, in the name of arbitrary and capricious review, to set "determinate, binding standards" such as those ultimately

theory would threaten to turn every departure from the principles articulated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), into a constitutional case. Needless to say, such a result would vastly and inappropriately enlarge courts' authority to invalidate agency action on constitutional grounds.

Respondents Appalachian Power, *et al.*, also offer a second theory as to how an "undisputedly" constitutional statute may be transmuted into an unconstitutional one in an agency's hands, and in this instance they are joined in their argument by respondents ATA, *et al.* Respondents contend that the court's ruling invalidating EPA's rules under the Clean Air Act on constitutional grounds is "functionally indistinguishable" from a "work-a-day" ruling that, according to the principles of *Chevron*, the agency simply misinterpreted the Clean Air Act. (ATA Resp. 14; *see also* App. Pwr. Resp. 13 & n. 27, 15; *cf.* Nat'l Stone Resp. 9).[2]

---

required by the court (App. 12). See Brief of Non-State Clean Air Act Petitioners and Intervenors 48-53 (Ozone Rule).

[2]Although all of the respondents appear to agree that EPA misinterpreted the Clean Air Act, they do not agree as to how the agency *should* have interpreted the Act. For example, compare Nat'l Stone Resp. 9 (arguing that EPA misinterpreted Act in not quantifying risk before regulating) with App. Pwr. Cross-Pet. (arguing that EPA misinterpreted Act to preclude consideration of factors unrelated to public health effects resulting from pollution's presence in ambient air). As we discuss in our opposition to respondents' cross-petitions, respondents offer quite a varied array of different possible interpretations of the Clean Air Act in the course of arguing that the meaning of the statute is clear. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

Nowhere did the court below suggest, however, that EPA had *misinterpreted* the Clean Air Act. Indeed, the court *upheld* EPA's longstanding interpretation of the statute to forbid the consideration of costs and feasibility in setting the NAAQS. (App. 17-20.)[3] Rather than finding that EPA's position was a misinterpretation of the Clean Air Act, the court found that the agency's interpretation, though permissible under the statute, was unconstitutional. This ruling is a world away from a ruling that EPA merely misinterpreted the statute. Here, too, therefore, respondents work hard to dismiss the constitutional significance of the court's ruling, and in doing so both misread the court's opinion and intimate that agencies that violate *Chevron*, violate the Constitution. (App. Pwr. Resp. 16 & n. 35 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), a garden-variety statutory interpretation case, as a "'nondelegation'" case).)

Respondents' understandable desire to distance themselves from the dubious constitutional foundations of the lower court's decision cannot be squared with their argument that the constitutional status of the Act as interpreted for thirty years is so seriously in doubt that this Court should rewrite the Act in order to avoid deciding a constitutional question. (ATA Cross-Pet. I.) Respondents cannot have it both ways. An "undisputedly" constitutional statute does not require or permit invocation of the canon counseling avoidance of constitutional decisions: "The canon about avoiding constitutional decisions . . . must be used with care, for it is a closer cousin to invalidation than to interpretation. . . . Constitutional decisions breed penumbras, which multiply questions. Treating each as

---

[3]In our Brief in Opposition, we explain why the Conditional Cross-Petitions on this statutory question should be denied. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

justification to construe laws out of existence too greatly enlarges the judicial power." *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.).

2. *The enforceability of the revised ozone standard.* Respondents do not seek review of the D.C. Circuit's ruling that the Clean Air Act authorized EPA to revise the air quality standard for ozone. (App. 31-33.) Nor do they challenge the court's holding that EPA must designate areas as attainment, nonattainment, or unclassifiable under the revised standard. (App. 33-34.) Nevertheless, they argue that the court's ruling that section 181(a)(1) precludes EPA from *enforcing* the revised ozone standard is unworthy of this Court's review because the court's decision is correct and because the ruling is in an interlocutory posture. Neither of these assertions has merit.

In arguing that the language of section 181(a)(1) supports the lower court's ruling, respondents ignore most of the language of this provision. As we set forth in detail in our Petition, the language of sections 181 and 182 overwhelmingly points to the conclusion that these provisions are exclusively concerned with implementation of the former, one-hour ozone standard – the standard that existed when these sections were enacted. (Pet. 21-25.)

Respondents also never confront the absurd implications of the lower court's interpretation of section 181(a)(1). The court held that EPA may revise the ozone standard and, if it does so, it *must* designate areas according to their attainment status *under the revised standard*. (App. 33-34.) However, if section 181(a)(1) is interpreted as the court below interpreted it, then the agency must *disregard its designations under the revised standard* and *classify* areas according to the previous, one-hour ozone standard. (Pet. 23-24.) This conclusion follows from the plain language of section 181(a)(1): areas

designated nonattainment under this provision must be classified "according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. 7511(a)(1). The interpretation methodology in effect at that time was based on the previous, one-hour ozone standard. (Pet. 23 & n. 9). Thus, if EPA must, as the court below held and as respondents claim, classify areas under the revised standard under section 181(a)(1) of the Act, and not under Subpart 1, then EPA will be forced to classify areas according to the ozone standard that it has abandoned. There is no warrant in the language, structure, or purpose of the Clean Air Act for sanctioning such an odd result.[4]

Nor does the legislative history support respondents' awkward reading of section 181(a)(1). Respondents ATA, *et al.*, claim that "Congress *specifically considered* and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims that *enacted* statute does." (ATA Resp. 23 (emphasis added and in original).) While it is true that the version of Subpart 2 contained in the original House and Senate bills referred specifically to the bills' equivalent of section 107(d)(4) rather than to 107(d) as a whole, there is nothing in

---

[4]Subsequent legislation confirms our reading of the statute. In the Transportation Equity Act for the 21st Century, Congress reaffirmed the States' and EPA's obligations to designate areas under the revised ozone standard. Congress extended the States' statutory deadline for submitting designations, and shortened EPA's deadline for promulgating them. Pub. L. No. 105-178, § 6103, 112 Stat. 465 (1998). Under respondents' interpretation of the Clean Air Act, Congress, in taking this action in 1998, simply – pointlessly – reaffirmed the States' and EPA's obligations to promulgate designations that would then be completely ignored.

the legislative history to suggest that this change was meant to transform a revised ozone standard from an enforceable standard into an unenforceable one. Indeed, the failure to include the single number "(4)" in the final law – which, on respondents' reading, dramatically reworked the regulatory scheme – went unremarked in the legislative history.[5]

Respondents also argue that the question whether the revised ozone standard may be enforced is in an "interlocutory posture" because EPA must now, in light of a part of the D.C. Circuit's decision not challenged here, consider and evaluate the claim that smog is good for people. (*E.g.*, App. Pwr. Resp. 29-30.) Respondents claim that EPA must now redo the entire process of setting air quality standards, including issuing a new Criteria Document – a process that Respondents ATA, *et al.*, assert will take from "three to five years." (ATA Resp. 17.)

Even assuming that respondents are correct in claiming that EPA must now entirely redo its work on the ozone standard, and even assuming they are correct that this process will take from three to five years, this gives this Court all the more reason to grant review of the question whether the ozone standard may be enforced. For if respondents are correct, EPA must now engage in a lengthy and complex process, likely involving scores of agency personnel, in order to revise a standard that the court below has ruled cannot be enforced. This would be a colossal waste of precious resources.[6]

---

[5]*See* H.R. Rep. No. 101-490, Pt. 1, at 229-232, *reprinted in* 2 1990 Legis. Hist. 3253-3256.

[6]Respondents also oppose review on the Subpart 2 issue on the ground that the lower court has "left open the door" to further proceedings with respect to Subpart 2. (ATA Resp. 20, citing the United States' appendix to its petition, at 81a.) The

Many of the parties in this case agree that the question whether EPA's revised ozone standard violates the nondelegation doctrine is worthy of this Court's review. Yet unless this Court also agrees to review the question whether this standard may be enforced, review of the constitutional question pertaining to the ozone standard may turn out to be a pointless exercise, as it may succeed only in either ratifying or undoing an agency standard that in any event may not be enforced. In this way, the constitutional and statutory questions petitioners have raised are closely connected, and this Court should review them together.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. FARMER
Attorney General
State of New Jersey

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attys. General, N.J.
Richard J. Hughes Justice
Complex 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

LISA HEINZERLING
Counsel of Record
Special Assistant Atty. General,
Massachusetts
Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9115

EDWARD G. BOHLEN
Assistant Atty. General, Mass.
200 Portland Street
Boston, MA 02114
(617) 727-2200, ext. 3358

---

only proceedings for which the court left open the door, however, are proceedings to reconsider the court's decision *not to vacate* the ozone standard. (U.S. App. 81a.)

Supreme Court, U.S.
FILED
MAR 28 2000
CLERK

(11) (9) (9)

Nos. 99-1257, 99-1263, 99-1265

IN THE

SUPREME COURT OF THE UNITED STATES

Carol. M. Browner, Administrator of the
United States Environmental Protection Agency, *et al.*,
Petitioners

v.

American Trucking Associations, Inc., *et al.*,
Respondents/Cross-Petitioners

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC. IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*

Frederick T. Stocker
Vice President and Counsel

Alex A. Beehler
Attorney

Manufacturers Alliance/MAPI Inc.
1525 Wilson Blvd, Suite 900
Arlington, VA 22209-2411
(703) 841-9000

Joseph E. Schmitz
Counsel of Record

Gregory S. Walden

PATTON BOGGS LLP
2550 M Street NW
Washington, D.C. 20037
(202) 457-6086
Counsel for Amicus Curiae Manufacturers Alliance/MAPI

22pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

ARGUMENT 5

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BENZENE* FOR THE COURT TO CLARIFY THE LIMITS OF AGENCY DISCRETION WHEN CONGRESS DELEGATES BROAD POWER OVER THE U.S. ECONOMY, BUT FAILS TO PROVIDE AN "INTELLIGIBLE PRINCIPLE" THAT ENCOMPASSES THE AGENCY'S ACTION. 5

A. The Court Should Grant *Certiorari* To Clarify The Application Of The Nondelegation Doctrine To Agency Policy Decisions That Profoundly Affect The Economy And Are Motivated By New (And Contested) Scientific Findings That Congress Neither Foresaw Nor Provided For. 6

B. The Court Should Grant *Certiorari* To Affirm That The Court Of Appeals Properly Rejected EPA's Interpretation Of Section 109 Of The Clean Air Act As Lacking Any "Intelligible Principle." 8

II. THE COURT CAN AND SHOULD USE THIS CASE TO SETTLE THE PROPER APPLICATION OF THE NONDELEGATION DOCTRINE AND TO SORT OUT THE ROLE OF ALL THREE BRANCHES OF GOVERNMENT IN ADAPTING LAWS TO CHANGING FACTS. 9

A. The Court Should Update and Refocus the Nondelegation Doctrine on Accountability By Reaffirming A Narrow Rule Of Construction. 10

B. When Congress Delegates Broad Authority, It Should Include Limiting Principles That Are Both Intelligible and Durable..... 12

C. When An Administrative Agency Feels Compelled To Act, But Finds That Changes In Science Have Rendered An Intelligible Principle Unworkable, The Agency Should Seek A Legislative Extension Of Its Authority. 15

CONCLUSION..... 17

TABLE OF AUTHORITIES

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)..... *passim*

American Power & Light Co. v. SEC, 329 U.S. 90 (1946)..... 13

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)..... 8, 15

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)..... 11

Food and Drug Administration v. Brown & Williamson Tobacco Corp., No. 98-1152, 529 U.S. – 9, 11, 14

Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607 (1980)..... 7, 8, 11

INS v. Chadha, 462 U.S. 919 (1983) 8

International Union, UAW v. OSHA (Lockout/Tagout I), 938 F.2d 1310 (D.C. Cir. 1991) 5

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)..... 10

Lead Industries, 647 F.2d 1130 (D.C. Cir. 1980)..... 8, 13

Mistretta v. United States, 488 U.S. 361 (1989).. 4, 10, 11, 12

National Cable Television Assn. v. United States, 415 U.S. 336 (1974)..... 11

United States v. Heth, 3 Cranch 399 (1806) 11

CONSTITUTIONAL PROVISIONS

Article I, Section 1 10

STATUTES

Clean Air Act, 42 U.S.C. 7401 *et seq.* ..... *passim*

National Industrial Recovery Act of 1933 2

OTHER AUTHORITIES

Benjamin Cardozo, *The Nature of the Judicial Process* (1921) 9

Randall Lutter and Christopher DeMuth, "Ozone and the Constitution at EPA" American Enterprise Institute (July 1999) 7, 13

Nos. 99-1257, 99-1263, 99-1265

In the Supreme Court of the United States

Carol M. Browner, Administrator of the
United States Environmental Protection Agency, *et al.*,
Petitioners

v.

American Trucking Associations, Inc., *et al.*,
Respondents/Cross-Petitioners

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC.[1]

INTEREST OF AMICUS CURIAE[2]

The Manufacturers Alliance/MAPI Inc. ("MAPI") is organized as a nonprofit research and educational institution, as defined in the Internal Revenue Code, 26 U.S.C. §501(c)(6), and is supported today by some 450 manufacturing companies. MAPI also operates the Institute for Technological Advancement, a nonprofit research and educational institution as defined under Section 501(c)(3) of the Internal Revenue Code. MAPI owes its existence in its present form to the Court's decision in *A.L.A. Schechter*

---

[1] Pursuant to Supreme Court Rule 37.6, in addition to Counsel identified on the cover, Brian Mannix, MAPI's Director of Science and Technology Studies, participated in authoring this brief. No entity other than MAPI provided financial support for this brief.

[2] The consent of the parties to the filing of the *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

Poultry Corp. v. United States, 295 U.S. 495 (1935) ("*Schechter Poultry*").

MAPI was originally organized as the Machinery and Allied Products Institute, an "industry association" under the National Industrial Recovery Act of 1933 ("NIRA"), for the purpose of drafting a "code of fair competition" for corporations in SIC Code 35, Machinery and Allied Products. The economic philosophy underlying NIRA – that the nation suffered from excess investment in productive capacity and would benefit from government-imposed restraints on competition and on new capital investment – was anathema to manufacturers of machinery and equipment. NIRA's direct restrictions on the purchase of new machinery was particularly troubling to members of SIC Code 35.

Thus, far from embracing its role as a "co-delegatee" with the National Recovery Administration, MAPI's founders recoiled from the code-development tasks they were directed to undertake. From its origin, MAPI was charged by its members with developing public policy arguments in support of economic expansion, technological innovation, and productivity growth, and in opposition to detrimental government restraints on capital investment.

After the Court vacated NIRA in *Schechter Poultry*, MAPI turned its energies to its research and education mission, which continues today. The petition and cross-petitions now before the Court involve MAPI's longstanding interest in the nondelegation doctrine as well as its longstanding opposition to broad governmental restrictions on economic growth and technological innovation.

Of particular interest to MAPI members are the sorts of restrictions on new capital investment that are typically imposed under the Clean Air Act within areas designated as "nonattainment" with respect to the ozone and particulate matter National Ambient Air Quality Standards ("NAAQS") at issue in this case. Just as such capital investment restrictions were not economically beneficial in 1935, they are not environmentally beneficial in 2000.

Among MAPI's members are the developers and producers of catalytic converters, fuel injectors, air bags, advanced power generation systems, gas turbines, and many other technologies that improve our lives in myriad ways. The members of MAPI are proud of the contributions they make to safety, fuel economy, and a cleaner environment, and they know that these desiderata do not flow from the tip of the regulator's pen. In its comments on the Office of Management and Budget's 1998 draft Report to Congress on the Costs and Benefits of Federal Regulations MAPI noted:

> Automobile manufacturers and their suppliers devote considerable resources to improving vehicle safety. The benefits NHTSA attributes to its regulation are, in fact, returns on the investment made by manufacturers. The people who work in product and materials research, manufacturing, quality systems, and even – perhaps especially – marketing, like to think that their efforts and their resourcefulness have contributed to the safety of modern cars. The same is also true for environmental benefits and other categories of regulatory benefits – rule writers may have helped, but they did not accomplish all these things on their own.

The substantial progress that has been made in safety and environmental quality over the past 65 years is the product of hard work, creativity, innovation, and capital investment.

Blanket restrictions on new capital investment are a blunt instrument for cleaning the air, and one that was intended to be used only as a temporary measure and only in isolated problem spots. Notwithstanding the demonstrable progress that has been made in air quality, EPA's revised NAAQS would perpetuate and dramatically expand the geographic scope of the nonattainment regulatory regime. The result will be very serious adverse consequences for our nation's economic prosperity, and no or even negative benefits for our environment.

SUMMARY OF ARGUMENT

The delegation of legislative authority in Section 109 of the Clean Air Act – as EPA would interpret it – is as broad, costly, standardless, and as inimical of political accountability as any comparable regulatory delegation since NIRA. Moreover, the delegation issue in this case is likely to recur with more regularity, because of dynamic developments in scientific knowledge and technology. The new paradigmatic case features: (1) a broad delegation to an agency; (2) profound changes in facts, science, or technology; (3) that were not directly addressed by Congress and (4) for which Congress made no administrative provision. Under these circumstances an intelligible principle in the original legislative delegation may no longer provide a meaningful guide to administrative action. This is just such a case.

'[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). MAPI respectfully submits that the Court can mitigate these enforcement difficulties by granting *certiorari* and reaffirming that: (a) only Congress may "establish [or expand] the standard of legal obligation" in the Clean Air Act; (b) both courts and agencies should utilize a narrow rule of construction for nondelegation cases such as this; (c) courts should give greater latitude to forms of delegation that provide a "balancing" principle for administrative action; and (d) a judicial preference for vacating rules rather than statutes is a reasonable and practical way to enforce the constitutional separation between the two political branches without wreaking unnecessary havoc on legislative and administrative processes.

ARGUMENT

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BENZENE* FOR THE COURT TO CLARIFY THE LIMITS OF AGENCY DISCRETION WHEN CONGRESS DELEGATES BROAD POWER OVER THE U.S. ECONOMY, BUT FAILS TO PROVIDE AN "INTELLIGIBLE PRINCIPLE" THAT ENCOMPASSES THE AGENCY'S ACTION.

We agree with petitioner EPA and cross-petitioners ATA, *et al.*, that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). We do not agree with petitioner EPA, however, that *certiorari* is warranted because the D.C. Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Contrary to EPA's assertion, the decision of the Court of Appeals is not a "radical departure from settled law;" but it does, as EPA points out, "raise[] questions respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments." EPA Petition at 9.

The Court of Appeals correctly recognized the vast delegation created by EPA's interpretation of its authority under Section 109 of the Clean Air Act. Citing *Schechter Poultry*, it noted that a "more precise" delegation is required because "the standards in question affect the whole economy." 175 F.3d at 1037. Moreover, the Court of Appeals found that the breadth of the delegation significantly exceeded another regulatory statute with a more focused reach on the U.S. economy where the Court of Appeals had found it necessary to fashion "intelligible principles" to constrain the agency's legislative discretion, *id.*, citing *International Union, UAW v. OSHA (Lockout/Tagout I)*, 938 F.2d 1310 (D.C. Cir. 1991) (discretion to "do nothing at all"

or "take the industry to the brink of ruin," with "all positions in between" would be unconstitutional). *Id.* Here, EPA's discretion runs from doing "close to nothing at all" to "send[ing] industry not just to the brink of ruin but hurtling over it," *Id.* Nor are there any "special theories," such as the war powers of the President, to justify an excessive delegation. *Id.*

In the years since *Schechter Poultry*, the nondelegation doctrine has continued to serve as one of the bulwarks of the constitutional separation of powers. This brief addresses the respective authorities and responsibilities of the three Branches of Government in this type of case. It also addresses other questions raised by petitioners and respondents to the extent that they bear on the meaning and application of the nondelegation doctrine.

A. The Court Should Grant *Certiorari* To Clarify The Application Of The Nondelegation Doctrine To Agency Policy Decisions That Profoundly Affect The Economy And Are Motivated By New (And Contested) Scientific Findings That Congress Neither Foresaw Nor Provided For.

The Court should grant *certiorari* not to reverse the decision of the Court of Appeals, which MAPI believes was essentially correct, but to provide guidance to agencies and reviewing courts as to the application of the nondelegation doctrine to the Clean Air Act and in similar contexts.

This case presents the question of what role the Court's nondelegation doctrine plays where advances in scientific knowledge or technology create a chasm between the factual context that an agency believes it is operating in and the factual context of the original legislation. By altering the meaning of even simple words like "safe" or "zero,"

scientific progress has the potential to render legislative decisions unrecognizable to those who made them.[3]

MAPI respectfully urges the Court to use this opportunity to clarify the proper role the nondelegation doctrine plays in reviewing broad congressional delegations of authority applied to facts that change as science and technology evolve. Twenty years have passed since this Court's decision in. *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"). Considering the vast reach of federal regulatory activities today, and the dramatic increase in health, safety, and environmental regulation grounded in scientific judgments, further guidance from the Court on the limits of delegation is necessary and timely.

This Court should grant *certiorari* in order to reaffirm that only Congress may "establish [or expand] the standards of legal obligation" (*Schechter Poultry*, 295 U.S. at 530) imposed in the Clean Air Act, and to provide guidance to EPA, to other Executive agencies, and to all reviewing courts as to their respective responsibilities where an "intelligible principle" is no longer apparent in the legislative delegation because of a change in facts, science, or technology, which Congress neither addressed nor foresaw.

---

[3] *See* Randall Lutter and Christopher DeMuth, "Ozone and the Constitution at EPA" American Enterprise Institute (July 1999) at 2 ("But whatever its fate on further appeal or in subsequent cases, the decision has revealed a serious problem at the heart of our environmental laws. The problem is not simply a matter of executive-branch usurpation or legislative-branch abdication; it is inherent in the tension between rigid legislation and fluid science.").

B. The Court Should Grant *Certiorari* To Affirm That The Court Of Appeals Properly Rejected EPA's Interpretation Of Section 109 Of The Clean Air Act As Lacking Any "Intelligible Principle."

The Court of Appeals noted several "intelligible principles" that theoretically could have guided EPA's discretion in its administration of delegated legislative authority, including some that are often used under health/risk regulatory regimes, *e.g.*, cost-benefit analysis, zero-risk, and generic unit of harm. 175 F.3d at 1038-40. However, both EPA and the Court of Appeals believe that cost consideration has been unavailable since *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

With respect to the Clean Air Act, we agree with industry cross-petitioners that this Court's review should encompass current D.C. Circuit case law that reads Section 109 of the Clean Air Act as precluding EPA from considering cost or technological feasibility. We suspect that considerations of cost do in fact influence EPA's thinking, and there is some evidence to that effect in the record. *See* ATA Conditional Cross-Petition, at 37-38 (citing EPA's "soft" $10,000 per ton of emissions reductions compliance-cost cap). We agree with and incorporate by reference cross-petitioners compelling argument that the real culprit here is a wrongly decided *Lead Industries*, especially in light of *Benzene*, *INS v. Chadha*, 462 U.S. 919 (1983), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *See* ATA Conditional Cross-Petition at 15-26. Therefore, we agree with the cross-petitioners' reformulation of the question to be presented: "Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors 'other than health effects relating to pollutants in the air,' given that considerations of such factors would permit both the Agency and reviewing courts

to avoid confronting constitutional nondelegation issues." ATA Conditional Cross-Petition at 2-3.

II. THE COURT CAN AND SHOULD USE THIS CASE TO SETTLE THE PROPER APPLICATION OF THE NONDELEGATION DOCTRINE AND TO SORT OUT THE ROLE OF ALL THREE BRANCHES OF GOVERNMENT IN ADAPTING LAWS TO CHANGING FACTS.

The proceedings below reveal not only a statutory delegation of legislative authority "not canalized within banks that keep it from overflowing." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring), but an urgent need for this Court to update its guidance for lower court navigation of hitherto uncharted nondelegation waters. The basic doctrine remains intact. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, No. 98-1152, 529 U.S. –, ("*Brown & Williamson*"), slip op. at 39 ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."). But its application is subject to widespread dispute. *See* 195 F.3d at 15 (Silberman, J., dissenting from denial of rehearing en banc) ("The panel, purporting to rely on interpretation . . . . By so doing I believe the panel undermines the purpose of the nondelegation doctrine.") Clearer instruction from this Court would dispel much of the prevailing confusion. *See* Benjamin Cardozo, *The Nature of the Judicial Process* 178 (1921) ("Little by little the old doctrine is undermined. . . . Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.").

Nondelegation decisions in 1935 invalidated Acts of Congress as unconstitutional; today nondelegation is typically combined with the doctrine of constitutional avoidance to provide rules of statutory construction. *See*

Mistretta, 488 U.S. at 371-74 & n.7 (reviewing cases). The underlying principle – legislative accountability – remains unchanged. But the roles of the actors need clarification.

A. The Court Should Update and Refocus the Nondelegation Doctrine on Accountability By Reaffirming A Narrow Rule Of Construction.

The constitutional basis for the nondelegation doctrine, Article I, section 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."), both empowers and constrains the Legislature. As the Court explained in *Schechter Poultry*, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. at 529. But this provision also constrains the other two branches: neither the Judiciary nor the Executive may legislate on its own authority and initiative, *i.e.*, without an "intelligible principle" having been first laid down by Congress. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

On rare occasions a statute will violate the nondelegation doctrine on its face – NIRA was such a case – because it displays "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring). More often, the combination of a statute's breadth and its ambiguity does not raise a question as to the constitutionality of its delegated authority until an agency attempts to interpret and apply the statute in a concrete setting.

MAPI respectfully submits that the inherent difficulty in enforcing the nondelegation doctrine (*see Mistretta*, *supra*), would be mitigated if the Court were to grant *certiorari* and reaffirm both a narrow rule of construction in cases such as this and the Court's own preference for vacating rules rather than statutes as a reasonable and practical way to enforce the constitutional separation of

powers between the two political Branches without wreaking unnecessary havoc on legislative and administrative processes.

When nondelegation raises questions about the constitutionality of a legislative enactment, both the agency and the reviewing court have an obligation to construe the statutory delegation of authority narrowly. *Cf. United States v. Heth*, 3 Cranch 399, 413 (1806)(Paterson, J.) ("[T]he words of a statute, if dubious, ought . . . to be taken most strongly against the law-makers."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part)("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").

Of course, when the consequences of an agency's rulemaking are massive, any interpretation of an agency's statutory authority "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, slip op. at 10.

If the agency is unable to identify an intelligible principle adequate to sustain its regulation, the reviewing court must decide whether to vacate the enactment of the Legislature or the action of the Executive. This Court consistently has preferred the latter as a less drastic remedy. *See Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene*, 448 U.S. at 646; *National Cable Television Assn. v. United States*, 415 U.S. 336 (1974)).

A remand to the administrative agency, such as the Court of Appeals ordered in this case, should be viewed neither as an appeal to the Executive's dispassionate expertise in statutory interpretation nor as an attempt to salvage a foundering statute. Rather, it is simply the most practical way for courts to resolve a conflict between ambiguous legislative authority and a particular agency regulation. This "no-fault" remand should not be thought of

as a "weak form" of the nondelegation doctrine, since the riot gear (overturning the statute) is still available for cases where it is needed.

It is not an unreasonable burden to require an agency either to explain the basis and scope of its discretion or, in the event that its authority is found wanting in the light of new science or technology, to propose a legislative expansion of its authority. The alternative – to permit an agency effectively to amend the statute in view of new science – while perhaps expedient, is constitutionally impermissible.

B. When Congress Delegates Broad Authority, It Should Include Limiting Principles That Are Both Intelligible and Durable.

This Court has long recognized the need for Congress to be able to delegate broad authority to an administrative agency. "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directions." *Mistretta*, 488 U.S. at 372.

But the Court is right to insist that such delegations be accompanied by an intelligible principle to guide the agency's exercise of discretion, in order to preserve the chain of political accountability between the Congress and the consequences of its legislative acts. Where governmental actions require difficult tradeoffs, it is essential that they be exposed to the discipline of political debate and democratic choice.

Congress does not fully discharge its duty merely by voting for good science, public safety, and a clean environment, without giving attention to the means by which statutory goals are achieved and to the range of consequences they may entail. Congress must not only "delineate[] the

general policy" an agency is to apply, it must also set "the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946).

We argue (supra) that these statutory boundaries should be construed narrowly against a background of changing science. But a principle of narrow construction need not interfere with valid Congressional delegations of authority, as long as the statute makes an appropriate provision for taking new information into account.

For instance, an intelligible principle that requires an administrative agency to balance the beneficial and harmful consequences of its actions is one that can accommodate a wide variety of factual circumstances and changing scientific understandings, without becoming impermissibly broad or vague.[4] It conveys the authority to take a range of actions in response to new information, but it harnesses that authority to a principle that is versatile without being vagrant. It permits the agency to cause harms or to impose substantial costs and obligations – even if they go far beyond what was anticipated by Congress – but only to the extent that they are warranted by a commensurate advancement of statutory objectives.

In contrast, a statutory principle that requires an administrative agency to ignore the harmful consequences of its actions – such as EPA finds in the Clean Air Act – cannot be regarded as durable, however intelligible it may be.[5] Such language must be construed narrowly to apply only to the particular factual context of the original legislation, because

---

[4] Lutter and DeMuth, supra n.3, at 2."Setting a standard based on two factors – one increasing and the other decreasing as the standard changes – produces, in principle, a determinate result."

[5] Various commenters have argued that the consideration of costs in setting NAAQS is forbidden (Petitioner EPA), permitted (Cross-petitioners), or required (Lutter & DeMuth). Without trying to resolve the dispute here, MAPI submits that if such consideration is forbidden, the EPA's authority must be narrowly construed. MAPI agrees with cross-petitioners that the Court should review the holding below that *Lead Industries* precludes EPA's consideration of costs.

to do otherwise would impermissibly sever the legislative act from its adverse consequences. If new science becomes available it cannot be presumed that Congress would arrive at the same conclusions that it did at the time of enactment, because (a) it could not consider adverse consequences of which it was not then aware AND (b) it made no provision for the agency to take account of them in an intelligible way.[6] When the Congress puts blinders on an agency, it also applies handcuffs, for an agency cannot be empowered to reach farther than it can see.

Nothing in the Constitution requires that the Congress use a substantive benefit-cost balancing standard when writing laws; nor does it require that the Congress impose such a standard on decisions it delegates to administrative agencies. If it wishes to enact a delegation of authority that is broad and durable, however, the Congress should choose some form of versatile standard that instructs the agency to balance the anticipated desirable and undesirable consequences of proposed administrative actions. Courts should give this form of delegation wide latitude, while at the same time reading narrowly other forms of delegation that are too rigid to allow for administrative adaptation to new facts. That is, the very versatility of the relevant "intelligible principle" can and should play a role in determining how far a particular congressional enactment is intended to reach.

---

[6] The majority opinion in *Brown & Williamson* correctly inferred that the rigidity of the statute – unsafe devices must be banned – argued for a narrow construction that did not treat cigarettes as a device. Slip op. at 19. The dissent argued that one could just as easily conclude that such a ban was required (Breyer, J., dissenting), sip op. at 14. Yet the rigidity of the statutory language compels the Court to apply it narrowly; a more flexible "balancing" principle might have been read more broadly.

C. When An Administrative Agency Feels Compelled To Act, But Finds That Changes In Science Have Rendered An Intelligible Principle Unworkable, The Agency Should Seek A Legislative Extension Of Its Authority.

The Court of Appeals in this case correctly recognized the difficulties inherent in a statute that ostensibly takes no account of costs and is applied to a pollutant whose harm displays no discernible threshold. Lacking a clear decision point, and lacking any overt balancing process, the reviewing court was left contemplating the black box of the unconstrained "judgment of the Administrator." The Circuit Court correctly concluded that the EPA's interpretation of Section 109 did not meet the established "intelligible principle" standard. Without a stated statutory limit on the EPA's discretion, the delegation appears "unconfined and vagrant." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring).

Following *Chevron,* the Court of Appeals in this case found that it is up to the agency – not the reviewing court – to rescue the constitutionality of the delegation by discerning the requisite intelligible principle. Of course, the agency, just like the reviewing court, must look to the text, context, and history of the congressional delegation to find such a principle, because Congress is the institution constitutionally accountable for the consequences of any expansion of the "standards of legal obligation." *Schechter Poultry,* 295 U.S. at 530.

Often, however, even where Congress has enacted an intelligible principle into law, some unanticipated change in science or technology may cause that principle to become obsolete, or fail to provide intelligible parameters in certain factual settings.

Under these circumstances, if the agency proposes to promulgate regulations that respond to a changed factual landscape, but cannot find an intelligible principle that

applies to the circumstances at hand, it should request from Congress an expansion of its authority. No administrative agency may lawfully address a given factual situation if its authorizing statute lacks an intelligible principle that can accommodate that situation. Nor can the agency solve the problem merely by consulting with scientists. Science dwells in the realm of fact, and fact by itself cannot make law.

Modern statutes, such as the Clean Air Act, frequently delegate authority to the Executive to decide what is "safe" or "adequate" or "requisite" to protect "the public health." One consequence is that agency rules are often based on scientific findings that are difficult for the courts to review. The degree to which a court should scrutinize an agency's scientific findings, and the degree to which this agency's science could withstand such scrutiny, are both interesting questions. But the more fundamental question is whether science is capable of resolving disputes that have deep economic and political dimensions.

In the present case, the EPA proposes a regulatory regime that imposes far greater costs than benefits – costs that the agency itself refuses to consider. A decision of this gravity must at some point acquire political legitimacy, and the agency must look to Congress to provide it. This political legitimacy can take the form either of an intelligible principle discerned from an existing statute (one adequate to the factual situation), or of an enactment expanding the agency's authority. But neither the judgment of an Administrator nor the conclusions of science can substitute for legislative deliberation.

The agency, whose action precipitated the controversy before the court, is in the best position to decide which of three courses to take: (1) Develop a new interpretation of its statutory authority that dispels any concern about unaccountable delegation; (2) Scale back its own regulation to comply with a narrower interpretation of its statutory authority; or (3) Propose to the Congress a statutory

amendment that would grant the agency the authority it believes it needs.

Petitioner EPA in this case would spurn all three avenues and now asks the Court, in effect, to remove the constitutional impediments to its free exercise of self-ascribed authority. MAPI respectfully urges the Court to grant *certiorari* in order to dispel any notion that such carte blanche authority can be countenanced within the constitutional separation of powers.

CONCLUSION

As this case provides an opportunity for the Court to enunciate the relevance of the nondelegation doctrine in reviewing agency interpretations of broad grants of authority in spheres of rapidly changing science, *amicus curiae* MAPI supports granting a writ of *certiorari*.

Respectfully submitted,

FREDERICK T. STOCKER
Vice President and Counsel
ALEX A. BEEHLER
Attorney
Manufacturers
Alliance/MAPI Inc.
1525 Wilson Blvd, Suite 900
Arlington, VA 22209
(703) 841-9000

JOSEPH E. SCHMITZ
Counsel of Record
GREGORY S. WALDEN
PATTON BOGGS LLP
2550 M Street NW
Washington, D.C. 20037
(202) 457-6086
Counsel for Manufacturers Alliance/MAPI Inc.

March 28, 2000

Nos. 99-1257, -1263, -1265

Supreme Court, U.S.
FILED
MAR 2 8 2000
CLERK

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

(*Case captions continued on inside cover*)

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

ELIOT SPITZER
Attorney General of
State of New York
PREETA D. BANSAL
Solicitor General
Counsel of Record
J. JARED SNYDER
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 474-8101

Attorneys for State of New York

(*Counsel continued on inside cover*)

21pp

MASSACHUSETTS AND NEW JERSEY,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION,

Petitioner,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

Of Counsel

ANDREW KETTERER
Attorney General of Maine
State House Station #6
Augusta, Maine 04333-0006

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

PHILIP MCLAUGHLIN
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301-6397

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania
16th Floor–Strawberry Square
Harrisburg, Pennsylvania 17120

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106

SHELDON WHITEHOUSE
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE D.C. CIRCUIT'S DECISION ON IMPLEMENTATION OF THE NEW EIGHT-HOUR OZONE STANDARDS WILL POSTPONE THE BENEFITS OF CLEANER AIR FOR MUCH OF THE NATION 6

II. THE D.C. CIRCUIT'S NONDELEGATION HOLDING IS CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT AND THROWS INTO DOUBT FEDERAL EFFORTS TO PROTECT THE HEALTH AND SAFETY OF ALL AMERICANS 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page**

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 9

American Trucking Associations, Inc. v. U.S. Environmental Protection Agency,
175 F3d 1027 (D.C. Cir. 1999), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999) ..... passim

Chevron U.S.A. Inc. v. NRDC,
467 U.S. 837 (1984) 8-9

FPA v. Hope Natural Gas Co.,
320 U.S. 591 (1944) 13

Federal Trade Commission v. Mandel Brothers, Inc.,
359 U.S. 385 (1959) 9

Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 9

Mead Corp. v. Tilley,
490 U.S. 714 (1989) 9

Mistretta v. United States,
488 U.S. 361 (1989) 13

National Broadcasting Co. v. United States,
319 U.S. 190 (1943) 13

Cases **Page**

Touby v. United States,
500 U.S. 160 (1991) 13

United States v. Southwestern Cable Co.,
392 U.S. 157 (1968) 13

Federal Statutes

Clean Air Act, ("CAA")
42 U.S.C. § 6923(a) 13
§§7401 et seq. ..... Passim
§7407(d)(4) 8
§7409 6
§7409(b)(11) 14
§7543(a) 4
§7607(d)(3) 14
§7511(a)(1) 7

Federal Aviation Administration ("FAA")
49 U.S.C. §44701 14
49 U.S.C. §44701(c) 14

Federal Food, Drug and Cosmetic Act,
21 U.S.C. §346a 13
21 U.S.C. §346a(b) 13

National Highway Traffic Safety Administration ("NHTSA")
49 U.S.C. §30111(a) 14
49 U.S.C. §30111(b)(1) 14

Solid Waste Disposal Act, ("SWDA")
42 U.S.C. §6923(a) 13

Miscellaneous

Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57 (Oct. 27, 1998) 3

L. Claudia, et al., Socioeconomic Factors and Athsma Hospitalization Rates in New York City, 36(4) Journal of Athsma at 344 (1999) 2

BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The northeastern States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont respectfully submit this brief as *amici curiae* in support of the Petitions for a Writ of Certiorari filed in this matter by the U.S. Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA; by the States of Massachusetts and New Jersey; and by the American Lung Association (collectively, the "petitions"). The petitions seek review of the D.C. Circuit's decision in *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), to remand EPA's revised eight-hour ozone National Ambient Air Quality Standards for ozone and fine particulate matter ($PM_{2.5}$).

INTEREST OF THE AMICI CURIAE

The northeastern amici States share an interest in obtaining review of the decision below in order to ensure the adequate protection of their residents' health and their environment. Residents of these States suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and $PM_{2.5}$ in the ambient air. Recent studies document an alarming increase in the asthma hospitalization rate in the northeastern United States including, in particular, the lower income neighborhoods of color in the Bronx and Upper

Manhattan, inhabitants of which suffer from rates of asthma that are at least double the national average.[1] As *parens patriae*, New York and the other amici States have a paramount interest in protecting their residents from the debilitating and potentially life threatening effects of asthma and other respiratory illnesses.

The record of the rulemakings at issue in this matter establishes that the revised standards will have a profound impact on public health, eliminating thousands of premature deaths attributable to air pollution each year and preventing tens of thousands of respiratory illnesses attributable to exposure to ozone and fine particulate matter.[2] Specifically, implementation of the revised standards will greatly improve the quality of life of the children and other persons who suffer from asthma, a disease aggravated by exposure to ozone and $PM_{2.5}$. The court below did not question the scientific basis for EPA's determination that the revised standards are needed to protect public health.

The Clean Air Act (the "Act") places primary responsibility for achieving clean air upon the states. To date, the efforts of many eastern states to obtain clean air that meets the old ozone standard have been hampered by the large amounts of ozone and its precursor, nitrogen oxides, that blow into the region from relatively uncontrolled power plants and

---

[1] *See* L. Claudia, *et al.*, *Socioeconomic Factors and Asthma Hospitalization Rates in New York City*, 36(4) Journal of Asthma at 344 (1999).

[2] The health benefits of the required standards are described in more detail in the American Lung Association's petition for certiorari.

other large industrial sources, many of which are located in areas classified as attainment with the old standard. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998). Some states, like New York and Connecticut, are endeavoring to meet their obligation to comply with the old one-hour EPA standard for ozone by the 2007 attainment date, while others, like Vermont and New Hampshire, find that transported pollution complicates their efforts to remain in compliance with the old standard. Implementation of the EPA's revised eight-hour ozone standards nationwide will greatly facilitate the northeastern states' ability to clean their own air because of the emission reductions that will be required throughout much of the eastern portion of the country, including states to the south and west of the amici States.

The interest of the amici States in obtaining review of the D.C. Circuit's decision extends beyond the implementation of the specific standards at issue. As recognized by Judge Tatel's dissent to the denial of the rehearing petition, joined by Chief Judge Edwards and Judge Garland, the D.C. Circuit's holding threatens to paralyze further EPA efforts to improve air quality, at the expense of the health of residents of the amici States and other states:

> Not only did the panel depart from a half century of Supreme Court separation of powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of

its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by millions of people. App. 91.[3]

Residents of the amici States benefit from a number of EPA programs directed at improving air quality, including EPA's efforts to control interstate transport of ozone and its precursors, and its imposition of more stringent emission control requirements for motor vehicles. Because the poor air quality in the Northeast is attributable in large part to air pollution transported from other states or to motor vehicle emissions that states are barred from regulating, pursuant to section 209(a) of the Act, 42 U.S.C. § 7543(a), the amici States find it extremely difficult to achieve any significant improvement in the quality of their air without EPA's exercise of its authority in other areas to reduce motor vehicle emissions and interstate pollution.

Finally, the ramifications of the nondelegation holding transcend EPA's efforts to obtain clean air for all Americans. The court's nondelegation holding threatens federal efforts to protect the health and safety of Americans under many diverse federal programs. Although the full ramifications of the decision are yet to be determined, it throws into question federal efforts to protect public health and safety in many areas such as automobile safety and airline safety, in addition to

[3] Citations are to the Appendix filed in support of the Massachusetts and New Jersey petition.

environmental protection. The amici States have a fundamental interest in seeing that the health and safety of their residents do not suffer as a consequence of the D.C. Circuit's decision.[4]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision will prevent or, at a minimum, postpone access to cleaner air for all Americans. The D.C. Circuit recognized the overwhelming body of scientific evidence that supported EPA's determination that the current .120 ppm one-hour ozone standard is inadequately protective of public health. Nevertheless, as a result of the D.C. Circuit's holding, the inadequate one-hour standard will be the only protection Americans will have against the health dangers of ozone pollution for many years to come. Even if EPA is able to formulate an "intelligible principle" to govern its setting of revised standards, the Court's holding that new ozone revised standards may only be implemented in accordance with the facially inapplicable subpart 2 classifications and compliance deadlines means that any protection Americans can expect from revised ozone standards will not be realized or, at best, will be postponed even further.

More generally, the D.C. Circuit's decision effectuates a fundamental alteration of the balance of power among the three branches of government in the area of environmental regulation. In the name of adherence to the principle that the democratically-elected Congress should make the fundamental

[4] Connecticut, New Hampshire, New York and Vermont participated in the D.C. Circuit proceedings as amici, submitting joint briefs with Massachusetts and New Jersey, which intervened in the cases.

policy determinations, the D.C. Circuit found inadequate the delimiting principles promulgated by Congress in section 109 of the Act, 42 U.S.C. § 7409, and remanded to EPA to come up with its own "intelligible principle" to govern its decisionmaking processes, which will then be reviewed by the D.C. Circuit. In the second portion of its holding, the D.C. Circuit rejected the agency's practical interpretation of the Act, in favor of the court's own technically intricate, but ultimately unsound reading of the relevant provisions. Both aspects of the D.C. Circuit's opinion have the effect of placing policymaking authority in the hands of the judicial branch, rather than the legislative and executive branches of government that are elected by the populace, and throw into doubt other federal efforts to protect the health and safety of Americans.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION ON IMPLEMENTATION OF THE NEW EIGHT-HOUR OZONE STANDARDS WILL POSTPONE THE BENEFITS OF CLEANER AIR FOR MUCH OF THE NATION

The D.C. Circuit's holding that any revised eight-hour ozone National Ambient Air Quality Standard ("NAAQS") may only be implemented in accordance with a statutory schedule and classification scheme intended to address the old ozone NAAQS will have significant ramifications for the amici States' efforts to obtain cleaner air. Regardless of whether EPA, on remand, is able to repromulgate the ozone NAAQS in

accordance with the Court's nondelegation holding, the obstacles erected by the court to implementation of the revised standards may prevent the States from implementing those standards.

The D.C. Circuit's determination that EPA must enforce the revised eight-hour NAAQS in accordance with the classifications and attainment dates adopted by Congress in 1990 is premised on a faulty interpretation of the Act's provisions governing implementation of the ozone NAAQS. At the core of the D.C. Circuit's holding is section 181(a)(1) of the Act, 42 U.S.C. § 7511(a)(1), entitled "Classification and attainment dates for 1989 nonattainment areas," which contains as its centerpiece a table that lists classifications and attainment deadlines for meeting the one-hour .120 ppm standard existing at the time of the 1990 amendments.[5] In reaching its holding that this table governs the classifications and attainment dates for areas found to be in noncompliance with the new eight-hour .080 ppm standards promulgated in 1997 (App. 75), the D.C. Circuit paid no heed to the fact that the classification scheme is

---

[5] Table 1 of the statutory provision reads as follows:

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

nonsensical when applied to a .080 ppm standard, rather than a .120 ppm standard, and it failed to explain how a statutory provision with attainment deadlines in the 1990s could possibly govern a revised standard that would not be implemented until after 2000.[6] In the name of allegiance to the statutory text, the D.C. Circuit also disregarded the clear statement in the title of section 181(a)(1) that it only governs "classification and attainment dates for 1989 attainment areas" on the grounds that "a title cannot be allowed to create an ambiguity in the first place." App. 39.

In opposing the granting of certiorari on this issue, industry respondents contend that it is the type of routine statutory interpretation question that is normally not reviewed by the Court. However, the D.C. Circuit's holding, if allowed to stand, throws into doubt the D.C. Circuit's continued adherence to *Chevron* deference. *Chevron U.S.A. Inc. v.*

---

[6] Other references in section 181(a) provide further evidence that its provisions are intended to apply only to areas designated as nonattainment with the standard existing at the time of the 1990 amendments. For example, section 181(a)(1) provides that the design value that forms the basis for the classifications should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Furthermore, section 181(a)(3) provides that the classifications should be made at the time of the designation of an area as nonattainment with the 1990 ozone standard under section 107(d)(4), 42 U.S.C. § 7407(d)(4); there is no procedure for classification under a new or revised standard. Finally, reclassification to nonattainment with the old one-hour .120 standard of areas initially designated as attainment in 1990 is governed by section 181(b)(1), which applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1).

NRDC, 467 U.S. 837 (1984). Instead of deferring to an agency interpretation of section 181(a) of the Act that is consistent with the substance and title of the provision,[7] the D.C. Circuit substituted its own reading of the statute for the reading adopted by EPA. At best, the cross-reference in section 181(a)(1) to section 107(d) rather than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation.[8] The ambiguity of the Act's provisions regarding implementation of revised standards is also reflected by the inability of the panel

---

[7] Under similar circumstances, this Court has found that the title of a statute provides valuable evidence of Congressional intent in enacting a statute. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

[8] In his opinion concurring in part and dissenting in part, Judge Tatel recognized that it is not the title of section 181(a)(1) that creates the ambiguity but that "the ambiguity in this statute . . . appears in the text of Subpart 2 itself." App. at 77. He explained:

> "As the agency argues, it is thus difficult to see how Subpart 2 can 'specifically provide[]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by table 1. . . This gap in Table 1 makes it at least ambiguous whether Subpart 2 '*specifically* provide[s]' classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS." *Id.*

As explained by Judge Tatel, it is for EPA, not the D.C. Circuit, to interpret an ambiguous statute, an interpretation that the D.C. Circuit is bound by *Chevron* to follow if reasonable. App. at 81.

and Judge Tatel to agree on a way to conform the provisions of subpart 1 and subpart 2.[9] However, rather than ensuring that the policy decisions are made by Congress and implemented by executive agencies, the D.C. Circuit's refusal to accord deference to EPA's reading of the statute effectuates a judicial usurpation of policymaking authority. To the extent that the D.C. Circuit's approach in this case signals a weakening of the principle of *Chevron* deference, federal agencies will find it increasingly difficult to fulfill their obligation to serve the public.

Furthermore, implementation of the revised standards will be hindered by the many uncertainties inherent in the court's treatment of the implementation issues. For example, does the panel's opinion allow the implementation of the revised ozone standards under subpart 1 in the large portions of the nation that do not fall into one of the subpart 2 classifications (i.e. areas that do not meet the revised eight-hour standard of .080 but do meet the old one-hour standard of .120)? If Judge Tatel is correct that subpart 1 provides the deadlines for areas that meet the old standard, does that mean

[9] On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." (App. 76). Judge Tatel stated that, in his view, "[s]ubpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under subpart 1." (App. 81). However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1" (App. 81) appears to conflict directly with the panel's holding that "[s]ubpart 2, not subpart 1, provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS." (App. at 39-40) (emphasis supplied).

that EPA must provide those areas with at least five years after they meet the old standard for compliance with the new standard? The apparent disagreement between Judge Tatel and Judges Ginsburg and Williams regarding the meaning of the D.C. Circuit's decision highlights the difficult task facing EPA and the states in conforming their conduct to the decision, making it likely that their attempts to implement the revised primary ozone NAAQS will be tied up in litigation regarding the meaning of the D.C. Circuit's decision for years to come.[10]

II. THE D.C. CIRCUIT'S NONDELEGATION HOLDING IS CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT AND THROWS INTO DOUBT FEDERAL EFFORTS TO PROTECT THE HEALTH AND SAFETY OF ALL AMERICANS

In its initial opinion, and in the opinion denying rehearing, the D.C. Circuit resuscitated the nondelegation doctrine, holding that, in the absence of a narrowing agency interpretation, section 109 of the Act effectuates an

[10] In its petition, EPA argues persuasively that the D.C. Circuit erred by reaching out to address the propriety of EPA's plan for implementation of the revised ozone NAAQS, an issue that was not ripe for consideration and not squarely before the court. The apparent failure of Judge Tatel and the panel to agree on the meaning of the D.C. Circuit's holding is directly attributable to the court's error in reviewing non-final agency action, rather than waiting for the agency to take concrete steps to implement the revised NAAQS. In the absence of review by this Court, public health and the environment will be threatened by the delays in implementation of the revised standard that will result from the inevitable litigation over the meaning of the D.C. Circuit's decision.

unconstitutionally broad delegation to EPA. Despite the efforts of industry respondents to recast the decision as a rather mundane and uncontroversial question of administrative law,[11] the court's holding clearly and necessarily includes a determination that the text of section 109 does not contain the "intelligible principle" found by the court to be required by the Constitution to confine administrative decisionmaking. Thus, the D.C. Circuit remanded the case to EPA to articulate another intelligible principle -- other than the principle actually found in the statute -- to govern its decisionmaking.

The doctrinal foundations of this determination are puzzling: having found the criteria articulated by Congress to be constitutionally inadequate, the D.C. Circuit is now inviting EPA to conjure up alternative principles to guide its own exercise of discretion. As explained by Judge Silberman's dissent from the denial of rehearing, this determination turns the nondelegation doctrine on its head, divorcing it from the underlying principle that it is the democratically-elected Congress, rather than appointed administrative agency officials, that should make the fundamental policy determinations. *See* App. 86-88.

The D.C. Circuit's holding threatens to alter profoundly the nation's health and regulatory framework. In finding that section 109 does not contain the required "intelligible principle," the court departed from decades of precedent

[11] *See, e.g.*, Brief in Response for the Respondents Appalachian Power Co., et al., at 13; Brief in Response for Respondents American Trucking Associations, Inc., et al., at 11-14.

upholding even broader delegations.[12] As explained by Judge Tatel in dissent, joined by Chief Judge Edwards and Judge Garland, "the Clean Air Act's requirement that EPA set air quality standards 'requisite to protect public health' with 'an adequate margin of safety' based on criteria that 'accurately reflect the latest scientific knowledge' is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." App. 90. *See also* EPA Pet. at 11-19.

The delegation at issue is also narrower than many delegations of regulatory authority found in other statutes intended to protect public health and safety. For example, the federal statutes governing pesticide residues in foods and hazardous waste transportation contain delegations for adoption of regulatory standards that are more open-ended than EPA's authority to promulgate NAAQS. *See* 21 U.S.C. § 346a (pesticide residues in food);[13] 42 U.S.C. § 6923(a) (hazardous waste transportation).[14] EPA's discretion in adopting new or

[12] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373 (1989); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Touby v. United States*, 500 U.S. 160 (1991).

[13] Under section 408(b) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(b), EPA may establish a tolerance for levels of particular pesticides on food if EPA determines "that there is a reasonable certainty" that no harm will result from exposure.

[14] Section 3003 of the Solid Waste Disposal Act, 42 U.S.C. § 6923(a), requires EPA to promulgate standards for the transportation of hazardous waste "as may be necessary to protect human health and the

(continued...)

revised NAAQS is also more circumscribed than the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). NHTSA's obligation to "consider relevant available motor vehicle safety information" (*id.* at § 30111(b)(1)) is less restrictive than the requirement that the NAAQS be "based on" on air quality criteria (42 U.S.C. § 7409(b)(11); and its duty to "consult" with other agencies (*id.* at § 30111(b)(1)) is more open-ended than EPA's obligation to consider, and explain any departure from, the CASAC recommendations. 42 U.S.C. § 7607(d)(3). Rules relating to airline safety are also promulgated under an equally broad delegation.[15]

Thus, unless the D.C. Circuit's ruling is reversed by this Court, it may lead to the undoing of federal regulations regarding such important matters as airline safety and automobile safety, in addition to environmental protection. A

(...continued)
environment."

[15] The Federal Aviation Administration (FAA) promulgates standards governing airline safety under 49 U.S.C. § 44701. Pursuant to section 44701(c), FAA is required to carry out this responsibility "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." In doing so, the FAA is required to "consider . . . the duty of an air carrier to provide the highest possible degree of safety in the public interest; and . . . differences between air transportation and other air commerce." This standard is similar to EPA's obligation to enact standards "requisite to protect public health" with an "adequate margin of safety."

decision joined by only four of the eleven members of the D.C. Circuit should not be allowed to effect such a profound alteration of this nation's health and safety regulatory framework without review by this Court.[16]

CONCLUSION

For the reasons set forth above and in the petitions, the Court should grant certiorari in these cases.

Dated: March 28, 2000

Respectfully submitted,

ELIOT SPITZER
Attorney General of State of New York
PREETA D. BANSAL
Solicitor General
Counsel of record
J. JARED SNYDER
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, New York 12224
(518) 474-8101

Attorneys for State of New York

---

[16] Two of the eleven members of the court did not participate.

8

7-20, 2000

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

DAVID J. KAPLAN
MARY F. EDGAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel

GERALD K. GLEASON
MICHAEL L. GOO
JAN M. TIERNEY
KEVIN W. MCLEAN
Attorneys
Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional, statutory, and regulatory provisions involved.	1
Statement	2
I. The Clean Air Act's NAAQS provisions	3
A. Air quality criteria and standards	3
B. Implementation of air quality standards	5
II. The particulate matter and ozone rulemaking proceedings	8
A. The particulate matter rule	9
B. The ozone rule	11
III. The proceedings below	15
Summary of argument	18
Argument:	
I. The court of appeals erroneously applied the nondelegation doctrine	21
A. Section 109 of the Clean Air Act does not constitute an unconstitutional grant of legislative power	22
B. The court of appeals improperly employed the nondelegation doctrine to expand the scope of its review	26
C. EPA has recognized limitations on its discretion to revise the particulate matter and ozone standards	31
II. The court of appeals lacked jurisdiction to review EPA's preamble statements on the scope of its authority to implement a revised ozone standard	34

Table of Contents—Continued: Page

A. EPA's preamble statements regarding implementation authority are not "agency action" within the meaing of Section 307(b)(1) of the Act 36
B. EPA's preamble statements do not constitute "final" agency action 38
C. EPA's preamble statements regarding implementation of the eight-hour ozone standard are not ripe for review 41
III. The court of appeals improperly restricted EPA's authority to implement the revised ozone standard 44
A. The Clean Air Act authorizes EPA to implement the revised ozone NAAQS under Subpart 1 of Part D 45
B. Delaying implementation of the revised NAAQS until the previous standard is attained conflicts with the Clean Air Act's requirement that all NAAQS be attained "as expeditiously as practicable" 48
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 38, 41, 42
ACLU v. *FCC*, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) 43
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 22, 24, 26, 27
Baltimore Gas & Elec. Co. v. *NRDC*, 462 U.S. 87 (1983) 27

Cases—Continued: Page

Bennett v. *Spear*, 520 U.S. 154 (1997) 38, 41
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 37
California v. *Rooney*, 483 U.S. 307 (1987) 37
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 43, 48, 50
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 27, 34
Ethyl Corp. v. *EPA*, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) 28
FPC v. *Conway Corp.*, 426 U.S. 271 (1976) 30
FTC v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959) 46
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 36, 37, 38, 43
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 25, 26
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 36
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 37
INS v. *National Ctr. for Immigrants Rights, Inc.*, 502 U.S. 183 (1991) 46
International Longshoremen's & Warehousemen's Union v. *Boyd*, 347 U.S. 222 (1954) 43
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980) 3, 5, 24, 29
Loving v. *United States*, 517 U.S. 748 (1996) 21
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 36, 44
Mead Corp. v. *Tilley*, 490 U.S. 714 (1989) 46
Mistretta v. *United States*, 488 U.S. 361 (1989) 21, 22, 23, 24, 25, 44
Montana-Dakota Util. Co. v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951) 30

Cases—Continued: Page

NRDC v. *EPA*, 902 F.2d 962 (1990), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991) 4, 28, 30
New York v. *EPA*, 852 F.2d 574 (D.C. Cir. 1988), cert. denied, 489 U.S. 1065 (1989) 28
Office of Communication of United Church of Christ v. *FCC*, 826 F.2d 101 (D.C. Cir. 1987) 43
Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 41, 42, 43, 44
Poe v. *Ullman*, 367 U.S. 497 (1961) 42
Reno v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) 41-42
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 42
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 22
Texas v. *United States*, 523 U.S. 296 (1998) 42
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 43, 44
Touby v. *United States*, 500 U.S. 160 (1991) 21, 24, 25
Train v. *NRDC*, 421 U.S. 60 (1975) 3, 6
Union Elec. Co. v. *EPA*, 427 U.S. 246 (1976) 6
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 27
Yakus v. *United States*, 321 U.S. 414 (1944) 21, 22, 26

Constitution, statutes and regulations:

U.S. Const. Art. I 1
Administrative Procedure Act:
5 U.S.C. 551(13) 36
5 U.S.C. 701(b)(2) 36
5 U.S.C. 706(2) 37

Statutes and regulations—Continued: Page

Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322 3
Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c), 81 Stat. 492-494 3
Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
§§ 101-193, 42 U.S.C. 7401-7515 (1994 & Supp. III 1997) 45
§ 107(d), 42 U.S.C. 7407(d) (1982) 6
§ 107(d), 42 U.S.C. 7407(d) 42, 45, 46
§ 107(d)(1), 42 U.S.C. 7407(d)(1) 5, 40, 48
§ 107(d)(1)(A), 42 U.S.C. 7407(d)(1)(A) 50
§ 107(d)(1)(C), 42 U.S.C. 7407(d)(1)(C) 48
§ 107(d)(3), 42 U.S.C. 7407(d)(3) 47-48
§ 107(d)(4), 42 U.S.C. 7404(d)(4) 48
§ 107(d)(4)(A), 42 U.S.C. 7407(d)(4)(A) 48
§§ 108-109, 42 U.S.C. 7408-7409 3
§ 108, 42 U.S.C. 7408 5
§ 108(a), 42 U.S.C. 7408(a) 39
§ 108(a)(1), 42 U.S.C. 7408(a)(1) 4
§ 108(a)(1)(A)-(B), 42 U.S.C. 7408(a)(1)(A)-(B) 23
§ 108(a)(2), 42 U.S.C. 7408(a)(2) 4, 23
§ 108(a)(2)(A)-(B), 42 U.S.C. 7408(a)(2)(A)-(B) 23
§ 108(b), 42 U.S.C. 7408(b) 28
§ 109, 42 U.S.C. 7409 ..... 2, 18, 22, 24, 26, 28, 29, 31
§ 109(a)(1), 42 U.S.C. 7409(a)(1) 4
§ 109(b)(1), 42 U.S.C. 7409(b)(1) 4, 23
§ 109(b)(1)-(2), 42 U.S.C. 7409(b)(1)-(2) 4
§ 109(b)(2), 42 U.S.C. 7409(b)(2) 4, 5
§ 109(d), 42 U.S.C. 7409(d) 39
§ 109(d)(1), 42 U.S.C. 7409(d)(1) 5, 45
§ 109(d)(2), 42 U.S.C. 7409(d)(2) 23
§ 109(d)(2)(B), 42 U.S.C. 7409(d)(2)(B) 4
§ 110, 42 U.S.C. 7410 ..... 3, 6
§ 110(a), 42 U.S.C. 7410(a) 6, 40

Statutes and regulations—Continued: Page

§ 110(a), 42 U.S.C. 7410(a)(1) 6
§ 110(c), 42 U.S.C. 7410(c) 6
§ 110(k), 42 U.S.C. 7410(k) 40
§§ 171-178, 42 U.S.C. 7501-7508 (1982) 6
§§ 171-179, 42 U.S.C. 7501-7509a (1994 & Supp. III 1997) 7
§§ 171-193, 42 U.S.C. 7501-7515 (1994 & Supp. III 1997) 6
§ 172, 42 U.S.C. 7502 ..... 16, 42
§§ 172(a) and (c), 42 U.S.C. 7502(a) and (c) (1982) 6
§ 172(a), 42 U.S.C. 7502(a) 5, 7, 8, 21, 40, 43, 45, 46
§ 172(a)(1), 42 U.S.C. 7502(a)(1) 45
§ 172(a)(1)(A), 42 U.S.C. 7502(a)(1)(A) 7, 21, 45
§ 172(a)(1)(C), 42 U.S.C. 7502(a)(1)(C) 8, 46
§ 172(a)(2), 42 U.S.C. 7502(a)(2) 45, 49
§ 172(a)(2)(A), 42 U.S.C. 7502(a)(2)(A) 7
§ 172(a)(2)(C), 42 U.S.C. 7502(a)(2)(C) 7
§ 172(a)(2)(D), 42 U.S.C. 7502(a)(2)(D) 8, 46
§ 172(b), 42 U.S.C. 7502(b) 40
§ 172(c), 42 U.S.C. 7502(c) 6, 40
§ 181, 42 U.S.C. 7511 ..... 16, 42
§ 181-185B, 42 U.S.C. 7511-7511f (1994 & Supp. III 1997) 7
§§ 181-191, 42 U.S.C. 7511-7514a (1994 & Supp. III 1997) 7
§ 181(a), 42 U.S.C. 7511(a) 16, 20, 35, 42, 46, 47, 48
§ 181(a)(1), 42 U.S.C. 7511(a)(1) ..... *passim*
§ 181(a)(5), 42 U.S.C. 7511 (a)(5) 49
§ 181(b), 42 U.S.C. 7511(b) 47, 48
§§ 182-187, 42 U.S.C. 7512-7512a (1994 & Supp. III 1997) 7
§§ 188-189, 42 U.S.C. 7513-7513b 7

Statutes and regulations—Continued: Page

§§ 191-192, 42 U.S.C. 7514-7514a 7
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 24, 34, 35, 36, 39, 50
§ 307(d), 42 U.S.C. 7607(d) 23
§ 307(d)(2)-(6), 42 U.S.C. 7607(d)(2)-(6) 32
§ 307(d)(3), 42 U.S.C. 7607(d)(3) 5, 24
§ 307(d)(6), 42 U.S.C. 7607(d)(6) 34, 37
§ 307(d)(6)(A), 42 U.S.C. 7607(d)(6)(A) 24
§ 307(d)(6)(b), 42 U.S.C. 7607(d)(6)(B) 15, 24
§ 307(d)(7)(B), 42 U.S.C. 7607(d)(7)(B) 35
§ 307(d)(9), 42 U.S.C. 7607(d)(9) 23, 24, 27, 30, 37
§ 1, 77 Stat. 395 3
Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 3
Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 3
§ 107(a), 84 Stat. 1679-1683 3
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 3
Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 ..... 3, 6
Pub. L. No. 105-178, 112 Stat. 107:
§ 6101(b), 112 Stat. 463 40
§ 6102(c), 112 Stat. 464 40
§ 6103(a)-(b), 112 Stat. 465 40
42 U.S.C. 1857c-5(a)(2)(A)(i)(1970) 6
40 C.F.R.:
Section 50.4(a)-(b) 49
Section 50.8(a)(1)-(2) 49
Section 50.9 (1990) 45
Section 50.9(b) 15, 39
Section 50.10 47
Pt. 50 App. I 47

Miscellaneous:

50 Fed. Reg. 25,532 (1985) 5
52 Fed. Reg. 24,634-24,635 (1987) 5
59 Fed. Reg. 38,906-38,907 (1994) 5

Miscellaneous—Continued: Page

61 Fed. (1996):
pp. 65,641-65,643 9
p. 65,642 32
p. 65,644 10
pp. 65,650-65,651 2
pp. 65,719-65,720 11
pp. 65,719-65,721 31
p. 65,723 12
p. 65,725-65,726 14
p. 65,727 33
p. 65,728 32
p. 65,730 ..... 32, 33

62 Fed. Reg. (1997):
p. 38,652 2
p. 38,653 9
p. 38,654 ..... 4, 9
pp. 38,656-38,657 31
p. 38, 657 10
p. 38,665 ..... 10, 31
pp. 36,665-38,668 10
p. 38,666-38,667 9
p. 38,669 10
p. 38,675-38,676 ..... 10, 11, 32
pp. 38,675-38,677 32
p. 38,676 ..... 10, 33
pp. 38,676-38,677 .....
p. 38,677 11
p. 38,683 11
p. 38,688 29
p. 38,856 2
p. 38,858 11
p. 38,859 ..... 11, 12, 31
p. 38,860 12
p. 38,861 12
pp. 38,861-38,873 13
p. 38,862 12
p. 38,863 ..... 12, 13, 33
pp. 38,863-38,864 ..... 13, 14
pp. 38,863-38,868 14

Miscellaneous—Continued: Page

p. 38, 864 14
pp. 38,864-38,865 14
pp. 38,864-38,868 33
p. 38,865 ..... 13, 33
pp. 38,867-38,868 14
p. 38,868 14
p. 38,868-38,869 15
p. 38,873 39
p. 38,878 15
p. 38,883 29
pp. 38,884-38,885 ..... 15, 17, 35, 36
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 24
H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1 (1990) 47, 49
Modern Epidemiology (K.J. Rothman & S. Greenland eds., 2d ed. 1998) 9
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) 24, 28
S. Rep. No. 228, 101st Cong., 1st Sess. (1989) 49
1 Staff of the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) 24-25

In the Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF
THE ENVIRONMENTAL PROTECTION AGENCY,
ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 175 F.3d 1027. The opinion on petitions for rehearing and dissenting statements on denial of rehearing en banc (Pet. App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The decision of the court of appeals was entered on May 14, 1999. Petitions for rehearing were granted in part and denied in part on October 29, 1999. The petition for a writ of certiorari was filed on January 27, 2000, and was granted on May 22, 2000. The jurisdiction of this Court is invoked under on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth in the petition appendix at Pet. App. 105a-126a. The EPA rules at issue in this case are set forth in the petition appendix at Pet. App. 102a-104a.

STATEMENT

Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, requires the Environmental Protection Agency (EPA) to establish and periodically revise, based on the latest scientific knowledge, primary National Ambient Air Quality Standards (NAAQS) "requisite to protect" public health with "an adequate margin of safety," and secondary NAAQS "requisite to protect" other public interests. On July 18, 1997, EPA issued final rules revising the NAAQS for two pollutants: particulate matter (PM) and ozone.[1] EPA decided to revise the PM and ozone standards because new scientific evidence showed that the standards then in effect were not adequately protecting millions of Americans from adverse health effects. For example, a quantitative risk assessment indicated that PM concentrations below the standards EPA established in 1987 may annually subject people in two urban areas alone, representing about five million people, to hundreds of early deaths, thousands of hospital admissions for respiratory illness, and tens of thousands of incidents of respiratory symptoms in children. See 61 Fed. Reg. 65,638, 65,650-65,651 (1996).

On petitions for review, the court of appeals held that Section 109, as interpreted by EPA in setting the revised PM and ozone standards, effected an unconstitutional delegation of legislative authority. The court remanded both rules for EPA to articulate an "intelligible principle" for determining the degree of public health protection to be afforded by the NAAQS. In addition, even though EPA had

[1] See NAAQS for Particulate Matter, 62 Fed. Reg. 38,652 (1997); NAAQS for Ozone, 62 Fed. Reg. 38,856 (1997). Copies of the Federal Register notices have been lodged with the Clerk of the Court.

taken no final agency action to implement the revised ozone NAAQS, the court issued an opinion, later modified, interpreting the scope of EPA's implementation authority.

I. THE CLEAN AIR ACT'S NAAQS PROVISIONS

The Clean Air Act sets up a comprehensive and extraordinarily detailed program for control of air pollution through a system of shared federal and state responsibility.[2] The NAAQS are a central feature of that program. Sections 108 and 109 of the Act require EPA to establish, review, and revise nationally applicable standards for a small class of common air pollutants. 42 U.S.C. 7408-7409. The NAAQS establish permissible concentrations of those pollutants in the "ambient," or outside, air. Section 110 of the Act then calls on the States to impose controls on individual sources of air pollution as necessary to attain and maintain the NAAQS. 42 U.S.C. 7410; see *Train* v. *NRDC*, 421 U.S. 60, 78-79 (1975); *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1137 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980).

A. Air Quality Criteria And Standards

The NAAQS-setting process begins with identification of air pollutants that are emitted from "numerous or diverse"

[2] Congress first addressed the problem of air pollution through the Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322, which authorized the Secretary of Health, Education, and Welfare (HEW) to conduct research activities. Congress later expanded HEW's authority to include, among other things, compiling and publishing air quality criteria based on scientific studies, Clean Air Act of 1963, Pub. L. No. 88-206, §1, 77 Stat. 392, 395. Congress later directed States to develop regionally based ambient air quality standards and provided mechanisms for enforcement, Air Quality Act of 1967, Pub. L. No. 90-148, § 108(c), 81 Stat. 492-494. Congress substantially revised that program through the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1679, which provided for national ambient air quality standards and for state implementation. See § 107(a), 84 Stat. 1679-1683. Congress continued to build on that program through the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. See text at p. 6, *infra*, and note 5, *infra*.

sources and that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7408(a)(1). EPA has identified six such pollutants, commonly referred to as "criteria" pollutants: sulfur oxides; nitrogen oxides; carbon monoxide; lead; ozone; and particulate matter.

EPA must develop "air quality criteria" reflecting the "latest scientific knowledge" on "all identifiable effects on public health or welfare" that may result from each criteria pollutant's presence in the ambient air. 42 U.S.C. 7408(a)(2). EPA generally records the scientific assessments constituting air quality criteria in a "Criteria Document," which provides a rigorous analysis of all pertinent scientific information. EPA also develops a "Staff Paper" to "bridge the gap" between the scientific review and the judgments the Administrator must make to set standards. See *NRDC* v. *EPA*, 902 F.2d 962, 967 (1990), opinion vacated in part, 921 F.2d 326 (D.C. Cir.), cert. denied, 498 U.S. 1082 (1991). Both documents undergo public notice and comment, as well as extensive scientific peer-review by the Clean Air Scientific Advisory Committee (CASAC), an independent committee established under the Act to advise the EPA Administrator on air quality criteria and NAAQS. 42 U.S.C. 7409(d)(2)(B); see 62 Fed. Reg. 38,654 (1997).[3]

Relying on the "air quality criteria," EPA promulgates "primary" and "secondary" NAAQS to protect against the adverse health and welfare effects of each criteria pollutant. 42 U.S.C. 7409(a)(1) and (b)(1)-(2). EPA must set "primary" standards at levels that, "in the judgment of the Administrator," are "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. 7409(b)(1). EPA must set "secondary" standards at levels that are "requisite to protect the public welfare" from any "known or anticipated adverse effects." 42 U.S.C. 7409(b)(2).

[3] We have provided a set of the Criteria Documents and Staff Papers for PM and ozone to the Clerk of the Court.

To ensure that standards keep pace with advances in scientific knowledge, EPA must review the air quality criteria and standards every five years and revise them as "appropriate in accordance with [Sections 108 and 109(b)]." 42 U.S.C. 7409(d)(1). When setting or revising NAAQS, EPA must consider and explain any significant departure from CASAC's recommendations. 42 U.S.C. 7607(d)(3).

Drawing on legislative guidance, EPA has developed decisional criteria to ensure consistency among its NAAQS decisions. EPA considers, among other public health factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk. See, *e.g.*, 97-1440 C.A. App. (PM App.) 1908. The court of appeals approved EPA's use of those factors 20 years ago, *Lead Indus.*, 647 F.2d at 1161, and EPA has since employed them in numerous NAAQS rulemakings.[4] The court reaffirmed its approval of EPA's use of those factors in this case. Pet. App. 5a, 6a-7a.

B. Implementation Of Air Quality Standards

The CAA sets out a detailed process, resting on principles of federal-state cooperation, to ensure that the air throughout the Nation "attains" the NAAQS. Within three years of promulgating a new or revised NAAQS, EPA must "designate" areas of the country as either "attainment" (*i.e.*, the area meets that NAAQS), "nonattainment" (*i.e.*, the area fails to meet that NAAQS), or "unclassifiable" (*i.e.*, adequate information is not available). 42 U.S.C. 7407(d)(1). Following designation, EPA must establish the date by which nonattainment areas shall attain that NAAQS (*i.e.*, the area's attainment date). See 42 U.S.C. 7502(a). The CAA provides for each State to develop, for EPA's approval, a state imple-

[4] See, *e.g.*, 59 Fed. Reg. 38,906-38,907 (1994) (carbon monoxide NAAQS); 52 Fed. Reg. 24,634-24,635 (1987) (PM NAAQS); 50 Fed. Reg. 25,532 (1985) (nitrogen dioxide NAAQS).

mentation plan (SIP) that sets forth pollution control measures necessary to attain all NAAQS by the applicable attainment dates. See 42 U.S.C. 7410(a), 7502(c). See generally *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976); *Train*, *supra*. If a State fails to develop an adequate SIP, then EPA must promulgate measures to attain the NAAQS in the form of a federal implementation plan (FIP). 42 U.S.C. 7410(c).

Congress laid the foundation for the CAA's current regulatory scheme through the Clean Air Act Amendments of 1970 and the Clean Air Act Amendments of 1977. See note 2, *supra*.[5] Congress built further on that foundation through the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, which address, among other things, the continuing problem of NAAQS nonattainment. Congress retained with limited modifications the basic planning obligations in Section 110 for States to implement all NAAQS, including "any revision thereof," in all areas of the Nation, regardless of their designation status. 42 U.S.C. 7410(a)(1). Congress, however, adjusted the attainment obligations for the NAAQS then in existence and revised the attainment obligations that would result if EPA promulgated new or revised NAAQS. As a consequence, the 1990 Amendments contain a complicated set of new implementation obligations, set out in the CAA's Title I, Part D, for nonattainment areas. See 42 U.S.C. 7501-7515 (1994 & Supp. III 1997).

---

[5] The Clean Air Amendments of 1970 introduced the NAAQS concept and required States to attain each NAAQS "as expeditiously as practicable but * * * in no case later than three years" after EPA approves a SIP. 42 U.S.C. 1857c-5(a)(2)(A)(i) (1970). The Clean Air Act Amendments of 1977 added a new outside attainment date (1982, or 1987 if extended, 42 U.S.C. 7502(a) and (c) (1982)), and introduced the concept of designating areas "nonattainment" for each NAAQS. 42 U.S.C. 7407(d) (1982). The 1977 Amendments also introduced a new "Part D," which contained additional attainment provisions for all NAAQS that apply to all nonattainment areas. See 42 U.S.C. 7501-7508 (1982) (Pt. D, Tit. I).

First, Congress modified the general nonattainment provisions that it had previously set out in Part D, see note 5, *supra*, and placed them in a new subpart, titled "Subpart 1 —Nonattainment Areas in General." 42 U.S.C. 7501-7509a (1994 & Supp. III 1997). Section 172(a) of that Subpart includes a new scheme for EPA to classify and establish attainment dates for nonattainment areas, based upon various factors, including the severity of the area's pollution problem. 42 U.S.C. 7502(a).[6] That scheme applies to all nonattainment areas "with respect to any [NAAQS] (or any revised standard, including a revision of any standard in effect on November 15, 1990)." 42 U.S.C. 7502(a)(1)(A).

Second, Congress created a series of new subparts in Part D, which address nonattainment of each of the then-existing NAAQS. See 42 U.S.C. 7511-7514a (1994 & Supp. III 1997) (Subpts. 2-5, Pt. D, Tit. I). Subpart 2 contains specific implementation provisions for the ozone NAAQS, which apply in addition to the general implementation provisions in Subpart 1. See 42 U.S.C. 7511-7511f (1994 & Supp. III 1997) ("Subpart 2—Additional Provisions for Ozone Nonattainment Areas").[7] Those provisions address the continued nonattainment, as of 1990, of the primary ozone NAAQS then in existence (*i.e.*, the "one-hour" ozone standard). Section 181(a)(1) of that Subpart sets out specific classifications and attainment dates that apply "by operation of law" for areas that, prior to the 1990 Amendments, were designated

---

[6] The dates must be set so that attainment is achieved as "as expeditiously as practicable," with outside dates that may range up to 10 years from the date an area is designated nonattainment, with two one-year extensions possible. 42 U.S.C. 7502(a)(2)(A) and (C).

[7] Subparts 3-5 contain additional provisions that address the continued nonattainment of the other existing standards. 42 U.S.C. 7512-7512a (1994 & Supp. III 1997); 42 U.S.C. 7513-7513b, 7514-7514a.

nonattainment under the one-hour ozone standard. 42 U.S.C. 7511(a)(1).[8]

Third, Congress reconciled EPA's general authority under Section 172(a) of Subpart 1 to classify and establish attainment dates for nonattainment areas with the attainment schedule in Section 181(a)(1) of Subpart 2 (and in other Subparts of Part D). Congress provided that EPA's authority in Section 172(a) shall not apply to "nonattainment areas for which classifications [or "attainment dates"] are specifically provided under other provisions of [Part D]." 42 U.S.C. 7502(a)(1)(C) and (a)(2)(D). Thus, to the extent that Section 181(a)(1) specifically provides classifications and attainment dates for areas designated nonattainment for the one-hour ozone standard, EPA may not invoke Section 172(a) to establish classifications and attainment dates for *that* ozone NAAQS.

II. THE PARTICULATE MATTER AND OZONE RULEMAKING PROCEEDINGS

On July 18, 1997, EPA promulgated revised primary and secondary air quality standards for PM and ozone. In each rulemaking, the Criteria Documents and Staff Papers underwent several rounds of review by CASAC, public comment, and revision by EPA. Ultimately, CASAC notified EPA that the PM and ozone Criteria Documents provided an adequate scientific basis for regulatory decisions. PM App. 3151; 97-1441 C.A. App. (Ozone App.) 235. CASAC also notified EPA that the PM and ozone Staff Papers, which among other things identified ranges of

[8] Table 1 of Section 181(a)(1) establishes specific classifications for nonattainment areas under the one-hour ozone standard based upon the area's "design value," which refers to the measurement methodology then in use. See note 29, *infra*. Table 1 also sets a corresponding attainment date for each classification, expressed as either 3, 6, 9, 15, or 20 years "after November 15, 1990," when the 1990 Amendments were enacted. 42 U.S.C. 7511(a)(1).

potential standards for the Administrator's consideration, were likewise scientifically adequate. PM App. 3162; Ozone App. 236-238. As required by Section 109, EPA then set new PM and ozone standards based on the revised air quality criteria. EPA provided exhaustive explanations of the basis for the two decisions, which we briefly summarize below.

A. The Particulate Matter Rule

Particulate matter encompasses a broad class of chemically and physically diverse liquid and solid particles. 62 Fed. Reg. at 38,653. Scientists generally distinguish between two categories of PM—fine and coarse. Both were encompassed by the "PM_{10}" standards that EPA set in 1987.[9]

EPA revised the PM standards based on new scientific studies that had emerged since EPA's last PM review, including an extensive body of epidemiological studies on exposure to PM pollution.[10] More than 60 such studies showed statistically significant positive associations between exposure to PM air pollution and serious adverse health effects, including premature death and illness severe enough to require hospital admission. 61 Fed. Reg. at 65,641-65,643; PM App. 1375-1778, 1801-1845 (Criteria Document). The same evidence identified several large "sensitive" popula-

[9] Generally, fine particles are by-products of combustion or the reaction and transformation of gases. PM App. 519, 1786. Coarse particles generally are the result of abrasion of material into smaller pieces, which are then suspended in the air by wind or human activity. *Id.* at 519, 1787. PM_{10} denotes particulate matter up to about 10 micrometers (μm) in diameter, which is the fraction of PM that can be inhaled into the human lungs. 62 Fed. Reg. at 38,654 n.1, 38,666-38,667. $PM_{2.5}$ denotes particles up to about 2.5 μm in diameter. *Id.* at 38,654 n.5.

[10] Epidemiological studies examine patterns of disease in real-world human populations. Epidemiologists look for statistical associations that may reflect cause-and-effect relationships, using the concept of statistical significance to separate those associations from results that may be the product of chance. See *Modern Epidemiology* 184 (K.J. Rothman & S. Greenland eds., 2d ed. 1998).

tions that may experience health effects at lower PM concentrations, or more severely, than the general public. 61 Fed. Reg. at 65,644. Those populations included the elderly, children, and people with cardiovascular and respiratory disease, including asthma. *Ibid.*; PM App. 1991-1993.

The scientific studies indicated that those very serious health effects were "attributable to PM at levels below the current NAAQS." PM App. 1870. The Administrator concluded, based on the nature of the health effects and the huge size of the affected populations, 62 Fed. Reg. at 38,657, that the studies provided "strong evidence that the current PM_{10} standards do not adequately protect public health, and that revision of the standards is not only appropriate, but necessary," *id.* at 38,665.

The Administrator decided she could best protect against the health risk posed by PM by adopting two sets of standards: (1) $PM_{2.5}$ NAAQS to control fine particles, which were likely responsible for those health effects associated with PM concentrations at or below the 1987 NAAQS; and (2) PM_{10} NAAQS to provide continued control of inhalable coarse particles. 62 Fed. Reg. at 38,665-38,668. The Administrator selected the annual $PM_{2.5}$ NAAQS as the "generally controlling" standard to reduce both long-term and peak $PM_{2.5}$ concentrations and adopted the 24-hour $PM_{2.5}$ NAAQS only to address unusual circumstances. *Id.* at 38,669.

To select the levels requisite to protect public health, with an adequate margin of safety, the Administrator relied chiefly on epidemiological studies that employed direct measures of fine particles, such as $PM_{2.5}$. 62 Fed. Reg. at 38,675-38,676 & n.41. "[P]lacing greatest weight on those studies that were clearly statistically significant," the Administrator concluded that an annual $PM_{2.5}$ standard of 15 micrograms per cubic meter of air ($\mu g/m^3$) "will provide an adequate margin of safety against the effects observed in these epidemiological studies." *Id.* at 38,676. That level is just below the range of 15.7 to 21 $\mu g/m^3$ that encompasses the

annual mean $PM_{2.5}$ levels in locations where epidemiological studies had shown statistically significant positive associations between fine particles and adverse health effects. *Ibid.*; PM App. 3506-3521. The Administrator acknowledged that "the possibility of effects at lower annual concentrations cannot be excluded," but she noted that the evidence supporting that possibility—which did not rise to the level of statistical significance—is "highly uncertain," and therefore did not warrant establishment of a lower annual standard. 62 Fed. Reg. at 38,675-38,676; PM App. 3506-3521.[11]

B. The Ozone Rule

Ground-level ozone is a ubiquitous pollutant formed in the air from the interaction in sunlight of nitrogen oxides and volatile organic compounds emitted from many sources. It is the principal component of smog and a powerful lung irritant. See 62 Fed. Reg. at 38,858.[12]

EPA's review of the latest scientific knowledge on ozone disclosed a large body of new research demonstrating associations between adverse health effects and exposure to ozone over longer periods, at more moderate levels of exertion, and at lower concentrations than had been shown by the studies available in 1979, when EPA had promulgated an ozone standard of 0.12 parts per million (ppm) averaged over one hour (the one-hour standard). 62 Fed. Reg. at 38,859; 61 Fed. Reg. at 65,719-65,720. Some of those new studies showed health effects associated with prolonged (six to eight hours) exposure to ozone levels as low as 0.08 ppm. 62 Fed.

---

[11] EPA adopted a 24-hour $PM_{2.5}$ NAAQS of 65 $\mu g/m^3$ to "supplement" the protection afforded by the annual $PM_{2.5}$ standard. 62 Fed. Reg. at 38,677. The Administrator also determined that secondary $PM_{2.5}$ standards identical to the primary $PM_{2.5}$ standards were appropriate to protect public welfare from, among other things, adverse effects on visibility. *Id.* at 38,683.

[12] The ozone NAAQS regulates harmful ground-level or "tropospheric" ozone, and not stratospheric ozone, which "provides a protective shield from excess ultraviolet radiation." 62 Fed. Reg. at 38,858.

Reg. at 38,859. The studies also showed that, in comparison to the general population, active children and workers who regularly engage in outdoor activities are at greater risk of experiencing adverse health effects from exposure to ozone. *Ibid.* In addition, people with pre-existing respiratory disease are more susceptible than others to the effects of ozone. *Ibid.* See generally Ozone App. 1460-1648, 1740-1780, 3770-3786, 3875-3881 (Criteria Document).

The scientific evidence convinced the Administrator that she should revise both the averaging time and the concentration level of the 1979 one-hour ozone standard. 62 Fed. Reg. at 38,863. She determined, and CASAC concurred, that an eight-hour standard was more consistent than a one-hour standard with the kind of prolonged exposures at which the scientific evidence showed children and others in at-risk populations were experiencing health effects of concern. *Id.* at 38,861. In addition, EPA's quantitative exposure and risk assessments showed that an eight-hour standard would provide significantly greater nationwide uniformity in health protection than a one-hour standard. *Id.* at 38,862.

To select a concentration level for the eight-hour averaging period, EPA employed a weight-of-evidence approach. Using, with CASAC's concurrence, guidelines of the American Thoracic Society, EPA considered the medical significance, or "adversity," of ozone-related health effects, which can vary widely. 62 Fed. Reg. at 38,860.[13] EPA also considered the public health implications of its conclusions regarding effects on individuals. For that purpose, EPA prepared quantitative exposure and risk assessments that used (among other information) data from human clinical

[13] For example, effects that may be mere nuisances to many healthy people may have serious consequences for asthmatics. EPA and CASAC also recognized that an effect that may be medically insignificant if experienced only once may, with repetition, become adverse by setting the stage for more serious illness. 61 Fed. Reg. at 65,723; Ozone App. 1881-1882.

studies to estimate, for various levels of ozone in the ambient air, the number of people within certain sensitive population groups likely to experience effects that would interfere with normal activity. *Id.* at 38,861-38,873.

EPA narrowed its consideration to the range of 0.07 ppm to 0.09 ppm for an eight-hour ozone standard. The upper bound for consideration could be no higher than 0.09 ppm because the exposure and risk assessments showed that the risks associated with an eight-hour standard of 0.09 ppm were "the same or only marginally smaller" than those associated with the 1979 one-hour standard, which EPA and CASAC agreed provided "little, if any, margin of safety." 62 Fed. Reg. at 38,863-38,864. The lower bound for consideration also emerged from the scientific evidence, including in particular: (1) the absence of any human clinical studies on exposures below 0.08 ppm, *id.* at 38,863; and (2) quantitative exposure assessments showing that a 0.07 ppm standard would, over the course of an ozone season, limit "exposures of concern" to "essentially zero," *ibid.*[14]

The Administrator explained why she found significant differences in the character of the available scientific evidence regarding ozone exposures within the range identified. She compared a 0.08 ppm standard to a 0.09 ppm standard on the basis of a number of factors, including estimates of the relative number of children that would experience adverse health effects, the relative frequency of such effects, and relative increases in hospital admissions. Those estimates and estimates of occurrences of "exposures of concern"

[14] With CASAC's concurrence, EPA deemed eight-hour exposures, during moderate exertion, to ozone concentrations of 0.08 ppm or above to be "exposures of concern" for purposes of the quantitative exposure and risk assessments. 62 Fed. Reg. at 38,865. In those analyses, EPA used data from human clinical studies, which necessarily related to only the mildest health effects. A single "exposure of concern" would not necessarily cause adverse effects, but is an indicator of the public health impacts of more serious effects.

under a standard of 0.09 ppm counseled against use of that concentration. 62 Fed. Reg. at 38,867-38,868; see note 14, *supra*. For example, EPA estimated that a 0.09 ppm standard would allow more than three times as many children to experience exposures of concern than would a standard of 0.08 ppm. 62 Fed. Reg. at 38,868.

The Administrator also explained why she concluded that a standard set below 0.08 ppm would be more stringent than requisite to protect against adverse effects of public health significance. See 62 Fed. Reg. at 38,863-38,868. With CASAC's concurrence, EPA had reasonably assumed, for purposes of the quantitative risk assessment, that there is no "effects threshold" for the categories of health effects measured in human clinical studies—lung function decreases and respiratory symptoms. EPA therefore assumed that those effects may occur at ozone levels below 0.08 ppm. See 61 Fed. Reg. at 65,725-65,726. As to those effects, the record showed that average responses caused by exposures even at 0.08 ppm were "typically small or mild in nature." 62 Fed. Reg. at 38,864. The Administrator recognized that repeated exposures at the 0.08 ppm level could potentially produce adverse effects for some unusually sensitive individuals, *ibid.*, but the record indicated that the "most certain" ozone-related effects at and below that level, even when adverse, are "transient and reversible," *id.* at 38,868. Moreover, the quantitative exposure and risk assessments showed that a standard set at 0.08 ppm would significantly reduce the number of such exposures. See *ibid.* As for more serious health effects, EPA lacked clinical data indicating the existence of an exposure-response relationship at ozone levels below 0.08 ppm. See *id.* at 38,863-38,864, 38,868; Ozone App. 1962. Furthermore, none of the CASAC advisors recommended setting the revised NAAQS at a level below 0.08 ppm. 62 Fed. Reg. at 38,864-38,865, 38,868. Accordingly, the Administrator reasonably concluded, based on the available evidence, that an eight-hour ozone standard

of 0.08 ppm would be sufficient to protect public health with an adequate margin of safety. *Id.* at 38,868-38,869.[15]

In addition to explaining the basis for its decisions, EPA responded, as required by the Act, 42 U.S.C. 7607(d)(6)(B), to all significant public comments. Various commenters had argued that, by enacting in 1990 specific provisions regarding implementation of the one-hour ozone standard then in effect, *e.g.*, 42 U.S.C. 7511(a)(1), Congress had effectively codified that standard and precluded EPA from revising it. In response, EPA explained that its authority to revise the one-hour ozone standard was clear on the face of the Act and then briefly and generally discussed how some of the Act's provisions would apply to implementation of a revised ozone standard. The sole purpose of that discussion was to respond fully to the comments arguing that the 1990 Amendments curtailed EPA's authority to revise the ozone standard. 62 Fed. Reg. at 38,884-38,885; see App., *infra*, 1a-6a (reproducing the preamble discussion).

III. THE PROCEEDINGS BELOW

Numerous industry groups, a public interest group, and several States and individuals challenged the revised PM and ozone NAAQS. The court of appeals rejected many of the challenges, but nevertheless remanded both final rules to EPA with instructions "to develop a construction of the act" that would satisfy this Court's "nondelegation doctrine." Pet. App. 4a, 5a. Relying on a theory that the parties had not extensively briefed, the court concluded that EPA's interpretation of Section 109 of the CAA "effects an unconstitutional delegation of legislative power." *Id.* at 4a. According to the majority, EPA's interpretation of the Act

---

[15] EPA set a revised secondary ozone standard identical to the revised primary standard. 62 Fed. Reg. at 38,878. In addition, EPA issued a separate rule, 40 C.F.R. 50.9(b), respecting future enforcement of the one-hour ozone standard, which the revised eight-hour ozone standard would replace. See note 26, *infra*.

leaves it "free to pick any point between zero and a hair below * * * London's Killer Fog," a notorious 1952 incident in which air pollution may have caused approximately 4000 deaths over four days. *Id.* at 13a. Judge Tatel dissented from that portion of the opinion, emphasizing that the majority "ignore[d] the last half-century of Supreme Court nondelegation jurisprudence" upholding numerous statutes containing fewer guiding principles than Section 109. *Id.* at 59a.

In the ozone case (No. 97-1441), the court of appeals rejected the industry petitioners' argument that the 1990 Amendments, which established mandatory classifications and attainment dates for the primary one-hour ozone standard then in effect, see CAA § 181, 42 U.S.C. 7511, precluded EPA from revising the ozone NAAQS. Pet. App. 34a-37a. That ruling resolved the issue before the court. The court of appeals nevertheless went on to direct what EPA may and may not do when it proceeds—in the future—to implement the ozone NAAQS. The court ruled that EPA cannot implement the revised ozone NAAQS through Section 172 (42 U.S.C. 7502), but must instead employ Section 181(a) (42 U.S.C. 7511(a)). Pet. App. 34a, 37a-44a. Because the requirements of Section 181(a) are tied to the one-hour standard, the court's ruling effectively meant, as the court itself recognized, that EPA could promulgate, but could not enforce, the revised ozone NAAQS. *Id.* at 57a.[16]

EPA and other parties filed petitions for rehearing and suggestions for rehearing en banc. The panel granted rehearing, in part, to modify its opinion regarding EPA's authority to implement the revised ozone standard. Pet. App. 71a-72a. The panel rejected EPA's argument that,

[16] The court of appeals resolved some, but not all, of the other challenges to the PM and ozone rules. See Pet. App. 4a-5a. The court concluded that some of the issues could not be resolved "until such time as EPA may develop a constitutional construction of the act." *Id.* at 5a.

because EPA had yet to take final action implementing the revised ozone NAAQS, the court lacked jurisdiction to consider which provisions of the Act would govern implementation, including the specification of classifications and attainment dates. *Id.* at 78a-80a. The court found that EPA's statements on that issue in the preamble accompanying the revised ozone standard, made in response to industry comments challenging EPA's authority to *promulgate* that standard, see 62 Fed. Reg. at 38,884-38,885, constituted final agency action on the question of implementation that was ripe for judicial review. Pet. App. 78a-80a.

On the merits, the panel modified its opinion to state that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. Judge Tatel wrote separately because he disagreed with the panel majority's reasoning. Pet. App. 83a-89a. He found the statute ambiguous and would have deferred to EPA's interpretation. *Id.* at 84a. Judge Tatel nevertheless concurred in the judgment because, in his view, the modified decision would allow EPA to implement the revised ozone standard under Subpart 1 once an area has attained the one-hour standard in accordance with Subpart 2. *Id.* at 89a. As to the nondelegation issue, the panel denied EPA's petition for rehearing. It expressly rejected EPA's view that the relevant provisions of the Act set out intelligible principles that limit the agency's discretion. *Id.* at 72a-76a. Judge Tatel again dissented. *Id.* at 89a, 97a-99a.

The court also denied EPA's suggestion for rehearing en banc, with five of the court's eleven active judges voting in favor of rehearing en banc, and four voting against it. Pet. App. 90a-92a. Judge Silberman and Judge Tatel each wrote statements dissenting from the denial of rehearing en banc on the nondelegation issue. *Id.* at 92a-96a, 97a-99a. Chief Judge Edwards and Judge Garland joined in Judge Tatel's statement. *Id.* at 97a.

SUMMARY OF ARGUMENT

1. The court of appeals incorrectly concluded that Section 109 of the CAA, as interpreted by EPA, violates the nondelegation doctrine. Section 109's requirement that NAAQS must be set at a level "requisite to protect" public health with "an adequate margin of safety" does not constitute an unconstitutional grant of legislative power. Furthermore, the nondelegation doctrine does not impose a constitutional obligation on EPA to go beyond what Congress has directed and announce a "determinate criterion for drawing lines." Pet. App. 5a-6a. The court's novel view that the Constitution demands such a precise criterion—and that the agency must supply it—is fundamentally unsound.

Congress has directed EPA to establish NAAQS by reference to the CAA's detailed requirements, which set out intelligible principles to guide EPA's actions. The CAA's directives, which are more specific than many statutory directives that this Court has upheld, amply ensure that Congress has not abdicated its power to make the laws. The CAA prescribes the legal standards governing EPA's decisions, factors that EPA must consider in making its decisions under Section 109, a body of experts that EPA must consult on those decisions, and a rigorous set of procedures that EPA must follow. In short, the Act establishes multiple specific restrictions that cabin EPA's discretion in setting NAAQS. The nondelegation doctrine does not require more.

The court of appeals' direction that EPA must narrow the scope of Congress's direction is not only unprecedented, it also is contrary to the purpose of the nondelegation doctrine. The Court has developed that doctrine to enforce the Constitution's requirement that Congress alone shall exercise legislative power. The court of appeals has improperly employed the doctrine to expand the scope of its judicial review authority beyond the limits that Congress has set through the CAA's statutory standards for review of agency

action. The court of appeals' conclusion that EPA must provide a "determinate, binding standard" for setting NAAQS is not only inconsistent with the CAA's recognition that NAAQS must be set in the face of scientific uncertainties, but it is also likely impracticable. An Executive Branch agency, acting pursuant to congressional direction, is entitled to assess the available evidence and make a reasoned judgment on the proper regulatory standard. Contrary to the court of appeals' characterization, EPA's interpretation of its authority did not leave it free to set a NAAQS at any point between zero and "a hair below" an air pollution level that killed 4000 people in four days. To the contrary, the rulemaking records reveal that EPA properly construed and applied limitations on its discretion. It provided reasoned explanations, supported by the record evidence, for why it chose the challenged PM and ozone standards in light of continuously evolving scientific knowledge.

2. The court of appeals also erred in prematurely deciding the scope of EPA's authority to implement and enforce the revised standard. The court did so by subjecting EPA's preamble statements on how it may implement the revised ozone standard to judicial review. Those preamble statements do not constitute judicially reviewable agency action. EPA made those statements to respond to comments that the implementation scheme in Section 181(a)(1) negates EPA's authority to promulgate a revised ozone standard. Once the court of appeals rejected that challenge to EPA's NAAQS revision authority, its task was done. It should not have treated EPA's preamble statements that explain the basis for EPA's ozone NAAQS as separate agency action that is independently subject to judicial review.

Even if EPA's preamble remarks about what future steps it intends to take to implement the ozone NAAQS constituted "agency action," they are certainly not "final" agency action. Those statements are not the consummation of the agency's decisionmaking process and they do not create any

rights or obligations. They simply express EPA's current views on some aspects of the complicated implementation process that EPA and the States will undertake through future rulemakings. The CAA sets out a detailed procedure for conducting those rulemakings. Under the statutory process, EPA will issue final rules on specific subjects in an orderly fashion, and each final rule will be subject to judicial review when the rule is ripe for the court's review.

Even if EPA's preamble statements constituted final agency action, they would not be ripe for review. The issue of how to reconcile the numerous provisions governing implementation is, at this stage, too abstract. The courts do not have the benefit of EPA's explanation of how and why it has implemented a NAAQS in a particular way, which would be available only after EPA has completed the relevant rulemakings, including any required public notice and response to comments, and taken final action that actually implements the standard. The courts should not review those complex implementation issues until EPA has had the opportunity to work through the various implementation provisions, reconcile any conflicts, make any policy judgments, and apply its expertise to resolve any ambiguities in the statute.

3. If the Court decides to reach the merits, it should rule that the court of appeals' modified decision is incorrect, even as interpreted by Judge Tatel in his partial concurrence. The CAA authorizes EPA to implement the revised *national* ozone standard contemporaneously throughout the country, regardless of whether an area is violating the one-hour ozone standard. The court of appeals' decision would inappropriately force EPA to delay protecting the public from the very health consequences that warrant a NAAQS revision in the first place, until the area attains an air quality standard that EPA has concluded is inadequate to protect public health. Congress could not have intended that implausible result.

The statutory provision on which the court of appeals primarily relied—Section 181(a) of Subpart 2—implements

only the one-hour ozone standard. It does not apply to the revised eight-hour ozone NAAQS or otherwise curtail EPA's authority to implement that standard under Section 172(a) and any other applicable provision of Subpart 1. Moreover, because the Act requires the attainment of all NAAQS "as expeditiously as practicable," 42 U.S.C. 7502(a)(1)(A), 7511(a)(1), the court of appeals erred in concluding that EPA must delay implementation of the eight-hour NAAQS in any area until it attains the one-hour ozone standard.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE NONDELEGATION DOCTRINE

The nondelegation doctrine is "rooted in the principle of separation of powers." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving* v. *United States*, 517 U.S. 748, 758 (1996). The nondelegation doctrine does not require, however, that Congress dictate every detail of a regulatory program. Congress may rely on the other branches to make rules that carry out its will. See *Loving*, 517 U.S. at 758; *Mistretta*, 488 U.S. at 372.

This Court's application of the nondelegation doctrine has been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. The Court has accordingly recognized that Congress does not violate the Constitution "merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991); see *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (Congress

may "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed framework").

The Court has specifically emphasized that Congress does not violate the nondelegation doctrine if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)); *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218-219 (1989). "Only if we could say that there is an *absence of standards* for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose." *Mistretta*, 488 U.S. at 379 (emphasis added) (quoting *Yakus*, 321 U.S. at 425-426).

A. Section 109 Of The Clean Air Act Does Not Constitute An Unconstitutional Grant Of Legislative Power

Contrary to the court of appeals' conclusion, Section 109 easily satisfies this Court's "intelligible principle" standard. This Court's decisions leave no doubt that Section 109 does not amount to an invalid delegation of legislative power and that EPA can properly fulfill the responsibilities that Section 109 assigns. Section 109's directives "are far more specific than the sweeping statutory delegations consistently upheld by [this] Court for more than sixty years." Pet. App. 97a (Tatel, J., dissenting from denial of rehearing en banc); see also *id.* at 93a (Silberman, J., dissenting from denial of rehearing en banc); *id.* at 59a-60a (Tatel, J., dissenting) (collecting cases).

The starting point for nondelegation analysis is the CAA's language, which must be read in context with due regard to the Act's purpose and history. See *American Power & Light*, 329 U.S. at 104. A perusal of this comprehensive

legislation, which Congress has repeatedly amended in light of new knowledge and developments (see note 2, *supra*), reveals that Congress has exercised its lawmaking function with exacting care. The Act, which now occupies more than 280 pages in the United States Code, is extraordinarily detailed and prescriptive. As the Act has evolved, Congress has consistently recognized the need to rely on an Executive Branch agency's scientific resources and expertise in executing the legislative purposes. At the same time, Congress has carefully channeled EPA's discretion through increasingly detailed substantive and procedural requirements.

Section 109(b)(1) of the Act requires that primary NAAQS be set at levels "requisite to protect the public health" with an "adequate margin of safety" and that secondary standards be set at levels "requisite to protect the public welfare." 42 U.S.C. 7409(b)(1). To warrant the setting of a NAAQS, a pollutant must "reasonably be anticipated to endanger public health or welfare" and be emitted from "numerous or diverse * * * sources." 42 U.S.C. 7408(a)(1)(A)-(B). Each standard must be based on "air quality criteria" that reflect "the latest scientific knowledge," 42 U.S.C. 7408(a)(2), including information on "variable factors" that "may alter the effects on public health," as well as interactions with other pollutants "to produce an adverse effect on public health or welfare." 42 U.S.C. 7408(a)(2)(A)-(B). Further, the Act establishes and prescribes the composition of CASAC (see p. 4, *supra*) and requires EPA to consider, and explain any significant departure from, CASAC's advice on revision of the air quality criteria and standards. 42 U.S.C. 7409(d)(2), 7607(d)(9).[17]

Section 307(d) of the Act, 42 U.S.C. 7607(d), which sets out the procedures for rulemaking and judicial review, further

---

[17] See *Mistretta*, 488 U.S. at 376 n.10 ("Congress' explicit requirement that the Commission consult with authorities in the field," among other things, gives content to the statutory mandate.).

ensures that EPA adheres to a "disciplined decisionmaking process" in setting NAAQS. See Pet. App. 63a (Tatel, J., dissenting). Congress has prescribed a rulemaking process that ensures extensive public participation. EPA must discuss the data, methodology, and major legal and policy interpretations underlying proposed NAAQS, 42 U.S.C. 7607(d)(3); provide a reasoned explanation for its decision, 42 U.S.C. 7607(d)(6)(A); and respond to significant comments, 42 U.S.C. 7607(d)(6)(B). EPA's rule is then subject to judicial review. 42 U.S.C. 7607(b)(1) and (d)(9).[18]

The Act's legislative history "provides additional guidance for [EPA's] consideration of the statutory factors" that is relevant for assessing the constitutionality of Section 109. *Mistretta*, 488 U.S. at 376 n.10. That legislative history, which the court below failed to consider, indicates that the health effects justifying a NAAQS must be "adverse," *Lead Indus.*, 647 F.2d at 1152 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970) (S. Rep. 1196)), in the sense that they are medically significant and not merely detectable, *id.* at 1155 n.51. To provide an "adequate margin of safety," standards must be "preventative or precautionary," reflecting an emphasis on the "predominant value of protection of public health." *Ibid.* (quoting H.R. Rep. No. 294, 95th Cong., 1st Sess. 49 (1977) (H.R. Rep. 294)); *id.* at 1155 (EPA must "err on the side of caution"). Furthermore, public health is distinct from individual health; the standards must protect sensitive populations, such as asthmatics, *id.* at 1152, but not the most sensitive individuals within those populations. See S. Rep. 1196, at 10 (EPA must consider effects on "a representative sample of persons comprising the sensitive group rather than to a single person in such a group."), in 1 Staff of

[18] The availability of such review weighs strongly in favor of the constitutionality of Section 109's grant of agency authority. See *American Power & Light*, 329 U.S. at 105 ("[p]rivate rights are protected by access to the courts to test the application of the policy in the light of the[] legislative declarations"); *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

the Senate Comm. on Pub. Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970*, at 410 (Comm. Print 1974).

In short, Congress has placed "multiple specific restrictions" on EPA's discretion in setting and revising NAAQS that satisfy the constitutional requirements of the nondelegation doctrine. *Touby*, 500 U.S. at 167. Those restrictions are at least as rigorous as those in *Touby* and other nondelegation cases, many of which in fact involved far less prescriptive legislation. See *id.* at 165.[19] The Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow in making its highly technical scientific judgments about the health and welfare effects of particular pollutants. As in *American Power & Light Co.*, the Act provides "a veritable code of rules" for EPA to fol-

[19] For example, in *Touby*, the Court held that the challenged statute, which authorizes the Attorney General to regulate new "designer" drugs, "meaningfully constrains" the Attorney General's discretion by requiring her to find that action is "necessary to avoid an imminent hazard to the public safety"; to "consider" three factors and statutorily prescribed criteria; to publish notice in the *Federal Register*; and to consider comments from an agency head. 500 U.S. at 166. In *Mistretta*, the Court held that the statutory authorization for sentencing guidelines is "sufficiently specific and detailed to meet constitutional requirements," noting that Congress specified three "goals" and four "purposes"; "prescribed the specific tool" for regulating sentencing; directed the Commission to consider seven "factors," and prohibited it from considering other factors; and explicitly required the Commission to consult authorities in the field of criminal sentencing. 488 U.S. at 374-375 & 376 n.10. In *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), the Court held the challenged statute constitutional because it established preconditions to presidential action; allowed the President to act only to the extent "necessary" to achieve the statutory objective; and articulated a series of specific factors that he was to consider in exercising his authority. *Id.* at 559.

low in fulfilling Congress's will. 329 U.S. at 105; see *Yakus*, 321 U.S. at 426.[20]

B. The Court Of Appeals Improperly Employed The Nondelegation Doctrine To Expand The Scope Of Its Review

This Court's nondelegation doctrine preserves the Constitution's separation of powers by ensuring that Congress does not abdicate its power to make laws. The court of appeals transformed that doctrine, however, into a judicial check on executive power. The court of appeals employed the nondelegation doctrine as an additional means, beyond the explicit judicial review provisions of the CAA, to supervise the exercise of administrative discretion. See Pet. App. 14a. The court directed EPA to "develop[] determinate, binding standards for itself" to reduce the likelihood that EPA would "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *Ibid.* That novel use of the nondelegation doctrine departs from the doctrine's purpose, it has no basis in this Court's precedents, and it trenches on Congress's power to specify appropriate standards for judicial review of executive action. See *id.* at 93a (Silberman, J., dissenting from the denial of rehearing en banc).

---

[20] Because Section 109 so plainly satisfies the nondelegation doctrine, there is no need to consider, as some of the industry respondents have urged, whether EPA should have read Section 109 more narrowly to avoid a constitutional issue. This Court rejected a similar argument in *Algonquin SNG, Inc.*, 426 U.S. at 558-559. In that case, the Court held that because the standards provided by the challenged statute were "clearly sufficient to meet any delegation doctrine attack," there was no need to give the statute a narrow construction to avoid an alleged "serious question of unconstitutional delegation of legislative power." *Id.* at 559. So too, in this case, "the terminology" of the Act "does not come so close to" the "boundaries limiting the scope of congressional delegation to the executive branch" as "to raise a serious constitutional problem." Pet. App. 93a (Silberman, J., dissenting from denial of rehearing en banc).

The court of appeals viewed the nondelegation doctrine as requiring Congress, or agencies interpreting the intent of Congress, to delineate a "determinate criterion for drawing lines." Pet. App. 6a. In the court's view, the Constitution requires that EPA supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the "right" level. See *id.* at 10a-11a, 73a. That approach, however, is inconsistent with the court's limited role in reviewing NAAQS. The CAA makes clear that EPA's actions in setting NAAQS are subject to review under the arbitrary or capricious standard of judicial review. See 42 U.S.C. 7607(d)(9). Under that standard, the court is limited to examining whether EPA's action "was based on consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (*Overton*). "The court is not empowered to substitute its judgment for that of the agency." *Ibid.* As Judge Silberman recognized, the court of appeals' approach would "implicitly assert[] a greater role for a reviewing court than is justified." Pet. App. 96a. See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").[21]

Moreover, the court of appeals' demand for a determinate criterion to govern EPA's NAAQS decisions is difficult to

---

[21] The court's direction to EPA to develop "determinate, binding standards" to govern the agency's NAAQS decisions (Pet. App. 14a, 73a) is also inconsistent with this Court's decision in *American Power & Light Co.*, which rejected the notion that there is "any constitutional requirement" obligating an agency to translate legislative standards into "formal and detailed rules of thumb" before applying them. 329 U.S. at 106. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978) (courts may not impose on agencies procedures that are not imposed by statute).

reconcile in practice with the Act's command that EPA set NAAQS—and revise them, as appropriate, every five years—based on the "latest scientific knowledge." 42 U.S.C. 7408(b). As the D.C. Circuit has recognized in the past, Congress has directed EPA to make "predictions * * * at the frontiers of science." *NRDC*, 902 F.2d at 968 (quoting *New York* v. *EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988), cert. denied, 489 U.S. 1065 (1989)); accord *Lead Indus.*, 647 F.2d at 1147. Because "the statute is '*precautionary*' in nature, the evidence 'uncertain or conflicting' and the 'regulations designed to protect the public health,'" the court of appeals has recognized that Congress did "not demand rigorous step-by-step proof of cause and effect." *NRDC*, 902 F.2d at 968 (citations omitted).

The purpose of Section 109's requirement that NAAQS provide an "adequate margin of safety" is to ensure "a reasonable degree of protection * * * against hazards which research has not yet identified." *Lead Indus.*, 647 F.2d at 1150 (quoting S. Rep. 1196, at 10). EPA must therefore be able to draw conclusions from "suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *NRDC*, 902 F.2d at 968 (quoting *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 28 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976)); H.R. Rep. 294, at 43-51, 110-112. To hold EPA to the court's novel demand for precision would restrict the agency's ability to act on a precautionary basis in the face of scientific uncertainties, thereby potentially eroding the public health protection Congress intended NAAQS to afford.

The court of appeals' requirement that EPA develop a "determinate criterion for drawing lines" (Pet. App. 6a), which EPA would presumably be required to apply in every NAAQS proceeding (see *id.* at 73a), is also inconsistent with EPA's own expert assessment of the flexibility necessary to

apply Section 109's mandate to all the pollutants for which EPA must develop standards. In the PM and ozone rulemaking proceedings, EPA received comments arguing that the Act required the agency to adopt various specific approaches to decisions under Section 109, such as, for example, first determining a "safe level" and then applying a margin of safety. 62 Fed. Reg. at 38,688, 38,883. In its response to those comments, EPA noted that the D.C. Circuit had specifically rejected claims that any of the approaches suggested by the commenters were required by the Act and instead had ruled that "[t]his court must allow [the Administrator] the discretion to determine which approach will best fulfill the goals of the Act." *Ibid.* (quoting *Lead Indus.*, 647 F.2d at 1161-1162).

The criteria pollutants that are subject to the NAAQS process vary widely in relation to key factors, including their health effects, the types of available scientific evidence, the kind and degree of scientific uncertainties, and the size of sensitive populations. Because of that wide variation:

> [T]he most appropriate approach to establishing a NAAQS with an adequate margin of safety may be different for each standard under review. Thus, no generalized paradigm * * * can substitute for the Administrator's careful and reasoned assessment of all relevant health factors in reaching such a judgment.

62 Fed. Reg. at 38,688; see *id.* at 38,883.[22]

---

[22] The two pollutants at issue here illustrate this fact. In assessing the health effects of PM and ozone, EPA determined that the most useful scientific information currently consists primarily of epidemiological studies in the case of PM, but currently consists primarily of human clinical studies in the case of ozone. The PM epidemiological studies provide evidence of very serious health effects associated with ambient pollution concentrations, but that evidence must be evaluated in light of potentially confounding variables that cannot be directly controlled when studying "real world" populations. The human clinical studies on ozone provide strong evidence of specific effects triggered by controlled

At bottom, the court's rationale for its approach—to prevent arbitrary agency action and to enhance judicial review (Pet. App. 14a)—overlooks that Congress is entitled to set the parameters for judicial oversight of EPA's scientific judgments. Congress has concluded that EPA's actions in setting NAAQS are subject to the arbitrary or capricious test. See 42 U.S.C. 7607(d)(9). EPA must consider the factors that the Act prescribes and provide a reasoned explanation, based on scientific evidence, for its decision. When reviewing that decision, a court is not entitled to demand that EPA demonstrate that the numerical standard the agency selected was the sole possible choice. To the contrary, as this Court explained in reviewing rates set by the Federal Power Commission under a statute requiring rates to be "just and reasonable":

> [T]here is no single cost-recovering rate, but a zone of reasonableness: "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high."

FPC v. *Conway Corp.*, 426 U.S. 271, 278 (1976) (quoting *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

This Court's decisions in *Conway* and similar cases do not announce novel concepts. The D.C. Circuit has itself acknowledged, when it reviewed the 1987 PM standard, that a reviewing court should not ask if EPA has identified "the clear and sole appropriate standard," but rather whether EPA has selected a standard that is reasonable in light of the record evidence. *NRDC*, 902 F.2d at 972. The court of appeals here relied on the nondelegation doctrine as its sole

---

pollutant concentrations, but—for ethical and other reasons—cannot be used to measure directly very serious health effects or effects in highly susceptible individuals.

justification for departing from that established standard of review. Pet. App. 12a-13a. Under this Court's precedents, Section 109 does not violate the nondelegation doctrine. The court of appeals improperly relied on that doctrine to depart from traditional principles governing the scope of judicial review of agency action.

C. EPA Has Recognized Limitations On Its Discretion To Revise The Particulate Matter And Ozone Standards

The court of appeals' nondelegation holding rests on the erroneous conception that EPA interprets Section 109 to set no limits on its discretion. The court characterized EPA as claiming discretion so broad as to leave it free to "pick any point between zero and a hair below * * * London's Killer Fog." Pet. App. 13a. To the contrary, EPA has recognized and applied principles that channel its discretion far more narrowly than the court acknowledged.

The CAA's directive that EPA must base the revised NAAQS on "air quality criteria" reflecting the "latest scientific knowledge" limits, at the outset, the alternatives that EPA can consider. EPA found that a wide range of adverse health effects were occurring at concentrations below the pre-existing PM and ozone NAAQS, which effectively dictated an *upper* bound for any revised NAAQS. The revised PM and ozone NAAQS had to be at least as protective as those pre-existing standards. See, *e.g.*, 62 Fed. Reg. at 38,656-38,657, 38,665; *id.* at 38,859; 61 Fed. Reg. at 65,719-65,721; pp. 10-13, *supra*. In each case, EPA also identified a *lower* bound for consideration at the most protective levels the scientific evidence reasonably supported. For PM, the lower bound was the lowest level at which long-term epidemiological data indicated there might be an "effects threshold" below which there is no risk of health effects. See PM App. 2145, 2147. For ozone, which appears to have no effects threshold (see note 23, *infra*), the lower bound—0.07 ppm—was the level at which EPA's exposure

assessment showed that exposures of public health concern were "essentially zero." 61 Fed. Reg. at 65,728, 65,730.

EPA's review of the latest scientific knowledge on the health effects of PM confined the agency to considering a quite limited range of 12.5 to 20 $\mu g/m^3$ for the annual $PM_{2.5}$ standard (and 20 to 65 $\mu g/m^3$ for the daily $PM_{2.5}$ standard). See 62 Fed. Reg. at 38,675-38,677; PM App. 2158 (Staff Paper). That range is obviously far more narrow than a range from zero to a "hair below" 2,500 $\mu g/m^3$ (the level the court of appeals assumed for the "Killer Fog"). Similarly, EPA's review of the latest scientific knowledge on the health effects of ozone confined the agency to considering an eight-hour ozone standard between 0.07 ppm and 0.09 ppm. See p. 13, *supra*. EPA had identified those ranges in its Staff Papers, and CASAC had agreed that EPA's identification of those ranges had sound scientific support. See PM App. 3162; Ozone App. 238; pp. 8-9, *supra*.

Furthermore, although EPA may exercise discretion in selecting a standard, EPA is constrained in doing so by the CAA's explicit requirement that the agency consider relevant factors, apply them to relevant facts, respond to criticisms, and adequately explain its rationale. 42 U.S.C. 7607(d)(2)-(6). In fulfilling those obligations, EPA employed the decisional criteria that the agency has long used to ensure consistency in its NAAQS decisions. See p. 5, *supra*.

For example, in setting the annual $PM_{2.5}$ standards, EPA took account of the "types of health evidence" and the "kind and degree of uncertainties." EPA identified a scientific criterion applicable to epidemiological studies—statistical significance to the 95% confidence level—to determine "how much uncertainty [was] too much" within the narrow range under consideration. See Pet. App. 10a; 62 Fed. Reg. at 38,675-38,676; 61 Fed. Reg. at 65,642 n.8; see note 10, *supra*. The scientific evidence showed statistically significant positive associations between $PM_{2.5}$ and adverse health effects in locations where $PM_{2.5}$ ranged from 15.7 to 21 $\mu g/m^3$.

See pp. 10-11, *supra*. But no study showed a statistically significant association between adverse health effects and $PM_{2.5}$ in any area with an annual $PM_{2.5}$ level *below* 15.7 $\mu g/m^3$. See 62 Fed. Reg. at 38,676; PM App. 3506-3521. EPA therefore set the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$, which EPA determined would be requisite to protect public health with an adequate margin of safety.

In the ozone rule, EPA selected the standard based primarily on consideration of "the nature and severity of the health effects," "the size of the sensitive population at risk," and, again, the "types of health evidence." EPA recognized that a standard of 0.09 ppm would not protect public health with an adequate margin of safety. See pp. 13-14, *supra*. EPA also recognized that its mandate is not to set standards more stringent than requisite to protect against health effects of public health significance. EPA identified important and meaningful differences in the character of the scientific evidence regarding risks—including the estimated frequency and duration of adverse health effects—associated with levels above and below 0.08 ppm. Those differences amply justified the Administrator's selection of the 0.08 ppm level as requisite to protect public health with an adequate margin of safety. *E.g.*, 62 Fed. Reg. at 38,864-38,868; 61 Fed. Reg. at 65,727, 65,730; see also pp. 13-15, *supra*.[23]

The record accordingly demonstrates that EPA did not exercise unfettered discretion in promulgating the revised PM and ozone standards. To the contrary, EPA explained in detail, with reference to the scientific evidence in the record, why it selected the challenged PM and ozone standards. The court of appeals thus failed to appreciate the record before it

---

[23] EPA and CASAC recognized that ozone has no apparent effects threshold. See, *e.g.*, 62 Fed. Reg. at 38,863. CASAC acknowledged that fact when it commented that no "bright line" differentiated ozone levels within the range of 0.07 ppm to 0.09 ppm. Ozone App. 238. CASAC's comment did not mean, however, that the public health effects were the same at any level within the range. See 62 Fed. Reg. at 38,865.

in erroneously concluding that EPA claimed such wide discretion that it could have set the new standards at virtually any level. Cf. *Overton*, 401 U.S. at 416.

II. THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW EPA'S PREAMBLE STATEMENTS ON THE SCOPE OF ITS AUTHORITY TO IMPLEMENT A REVISED OZONE STANDARD

Section 307(b)(1) of the CAA authorizes the D.C. Circuit to review "action of the Administrator in promulgating any [NAAQS]" and other "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. 7607(b)(1). In this case, the court of appeals plainly had jurisdiction to review EPA's promulgation of the ozone NAAQS. The NAAQS, which consists of a specific, two-paragraph rule, Pet. App. 104a, is final agency action. The court of appeals erred, however, in concluding that it also had authority to critique portions of EPA's explanatory preamble and thereby dictate the course of the agency's future implementation actions. The court of appeals' broad pronouncement that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," Pet. App. 81a, results from that court's premature and unfocused exploration of issues that were not properly before that court.

EPA's rulemaking addressed promulgation of a revised ozone NAAQS. The issue of implementation arose in the ozone case because participants in the rulemaking proceeding argued that, when Congress enacted the 1990 Amendments and included—in Section 181(a)(1) of Subpart 2—a scheme for implementing the then-current one-hour ozone standard, Congress thereby implicitly prohibited EPA from ever promulgating a revised ozone standard. See p. 15, *supra*. Section 307(d)(6) of the CAA requires EPA to respond to "significant comments." 42 U.S.C. 7607(d)(6). EPA accordingly addressed those arguments in the rule-

making preamble and, later, in its brief in the court of appeals. EPA explained generally, as part of its demonstration why the Section 181(a) scheme does not prevent EPA from promulgating a revised NAAQS, that the revised standard could be implemented through Subpart 1. See App., *infra*, 1a-6a; 62 Fed. Reg. at 38,884-38,885.[24]

The court of appeals was obligated to address the specific arguments that the rulemaking participants had raised in their judicial challenge to EPA's promulgation of a revised ozone NAAQS. See 42 U.S.C. 7607(d)(7)(B). The only issue involving "implementation" before the court of appeals, however, was whether the participants were correct that the Section 181(a) scheme precluded EPA from promulgating the revised standard. Once the court answered that question in the negative, Pet. App. 34a-37a, its task was done. It should not have gone on to consider prematurely whether and how EPA could implement the revised NAAQS.

The government objected, through petitions for rehearing and rehearing en banc, to the court of appeals' decision to address an issue that was not properly before it. The court responded by asserting that it had jurisdiction to address the views that EPA expressed in the preamble because those explanatory statements about the agency's future intentions independently satisfied the final agency action requirement of Section 307(b) of the CAA. Pet. App. 77a-78a. That conclusion is wrong.

---

[24] Consistent with its position here, EPA explained in the rulemaking that "[a] number of commentors submitted comments * * * regarding implementation issues that are not relevant to the Ozone NAAQS review. Therefore, they are not being responded to in this document." Ozone App. 223. EPA clearly recognized that such comments were premature and would be addressed, if necessary, in later rulemakings.

A. EPA's Preamble Statements Regarding Implementation Authority Are Not "Agency Action" Within The Meaning Of Section 307(b)(1) Of The Act

The court of appeals has undertaken to address prospectively how to reconcile two complex portions of the CAA—Subparts 1 and 2 of Part D—even though EPA has not yet undertaken that task through rulemaking. The court justified its review on the basis that EPA stated, in an explanatory preamble, how it intends to reconcile those provisions. See 62 Fed. Reg. at 38,884-38,885 (App., *infra*, 1a-6a). Section 307(b)(1), however, limits the court of appeals to review of particular agency actions, such as "promulgating any * * * [NAAQS]" and other "final action * * * taken[] by the Administrator." 42 U.S.C. 7607(b)(1).

The CAA does not define the phrase "action * * * taken[] by the Administrator," but its meaning can be discerned from conventional principles of administrative law. Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980). The Administrative Procedure Act (APA) defines the term "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13); see 5 U.S.C. 701(b)(2). As this Court has indicated, the phrase "agency action" is limited to discrete acts that affect legal rights. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm."); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 247 (1980) ("In general, the term encompasses formal orders, rules, and interpretive decisions that crystallize or modify private rights.") (Stevens, J., concurring).

The CAA also draws a clear distinction between agency action and the agency's *explanation* of its action. For example, a promulgated rule—a familiar form of agency action—must be "accompanied" by "a statement of basis and

purpose" and "a response to each of the significant [public] comments [on the proposed rule]." 42 U.S.C. 7607(d)(6). That requirement facilitates judicial review of whether the agency's rule is "arbitrary, capricious, or an abuse of discretion," 42 U.S.C. 7607(d)(9). A court is entitled to set aside the rule if it concludes that the agency's rationale for the rule is inadequate. But in that situation, the court invalidates the rule itself —*viz.*, the agency's action—and not the agency's explanation for its action. See *ibid.*; see also 5 U.S.C. 706(2). The agency's explanation is not itself "agency action" that is independently subject to review. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black* v. *Cutter Labs.*, 351 U.S 292, 297 (1956)); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

In this case, EPA's "action" is promulgation of the revised ozone NAAQS, which consists of a discrete rule. See Pet. App. 104a. The rule itself makes clear that the preamble sets out the "reasons" for the rule. *Ibid.* The related preamble statements at issue here (see App., *infra*, 1a-6a) could properly be considered by the court of appeals only as they relate to the agency action in question—promulgation of the revised ozone NAAQS. Those statements do not themselves constitute "agency action." If they did, then virtually any regulatory preamble that endeavors to explain the basis for an agency's action would arguably spawn additional agency actions that are each potentially subject to judicial review and revision. Congress surely did not authorize courts to engage in that sort of broad and limitless anticipatory oversight of CAA programs. See *Standard Oil*, 449 U.S. at 247-249 (Stevens, J., concurring).

B. EPA's Preamble Statements Do Not Constitute "Final" Agency Action

Even if EPA's preamble statements constituted "agency action," they do not constitute "final" agency action. In *Bennett* v. *Spear*, 520 U.S. 154 (1997), this Court identified two conditions that must be satisfied for agency action to be "final": (1) it "must mark the 'consummation' of the agency's decisionmaking process"; and (2) it "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-178. EPA's discussion of the Act's implementation provisions in the preamble does not satisfy either of those requirements.

The court of appeals improperly reconfigured the "consummation" prong by focusing solely on whether the plans that EPA described in the preamble appeared tentative or likely to change. See Pet. App. 77a-78a. Under *Bennett*, however, the proper inquiry is not merely whether the agency has any present intention to alter its position. Rather, the question is whether the agency has consummated its decisionmaking process. The answer necessarily depends upon what steps the governing statute requires.[25]

When EPA's preamble statements are considered in light of the CAA's implementation program, it is clear that they do not constitute final agency action. EPA completed the

[25] For example, the Court concluded in *Standard Oil Co.*, *supra*, that the action at issue—filing an administrative complaint—was not final agency action under the relevant statutory process. The Court explained that the action "is a prerequisite to a definitive agency position on the question whether Socal violated the Act, but itself is a determination only that adjudicatory proceedings will commence." 449 U.S. at 241-242. Likewise, in cases involving rulemakings, the Court has concluded that agency regulations are final if the agency has completed the applicable rulemaking procedures and promulgated a legally binding rule that completed action within the context of the substantive regulatory program. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149-152 (1967) (discussing cases). Thus, the certitude of an agency's statements, standing alone, does not satisfy the consummation prong.

statutory process for reviewing the existing ozone standard, 42 U.S.C. 7408(a), 7409(d), and reached a final decision promulgating the eight-hour ozone standard. EPA thus consummated its decisionmaking process and took final agency action in *promulgating the NAAQS*. 42 U.S.C. 7607(b)(1). EPA, however, has hardly begun and has not yet completed any step in the CAA's distinct process for implementing the revised ozone NAAQS, which requires additional rulemaking procedures.[26]

The CAA provides EPA up to three years after promulgating a revised NAAQS to designate all areas within the Nation as attainment, nonattainment, or unclassifiable for

[26] As part of the ozone NAAQS rulemaking, EPA issued a separate rule, 40 C.F.R. 50.9(b), respecting future enforcement of the *one-hour ozone standard*, which the eight-hour ozone NAAQS will replace. That rule states that

> The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

Ibid. EPA issued that rule as a transition measure to relieve areas that are in compliance with the one-hour ozone standard from the obligation to comply with both the old one-hour standard and the new eight-hour standard. See 62 Fed. Reg. at 38,873. In the course of explaining that rule, EPA stated in the preamble that Subpart 1 would apply to implementation of the new eight-hour ozone standard. *Ibid.* See App., *infra*, 6a-8a.

Neither 40 C.F.R. 50.9(b) nor EPA's related preamble statement provides a jurisdictional basis for the court of appeals' decision limiting EPA's authority to implement the eight-hour standard under Subpart 1. As an initial matter, no party in this case challenged 40 C.F.R. 50.9(b), the court of appeals accordingly did not review it, and thus it clearly was not the predicate for the court of appeals' ruling. In any event, 40 C.F.R. 50.9(b) merely addresses interim enforcement of the pre-existing one hour standard. Neither 40 C.F.R. 50.9(b) nor EPA's preamble statements describing it resolve whether or how Subparts 1 and 2, and other provisions of the Act, may interact to limit EPA's authority to implement the eight-hour standard.

that standard. 42 U.S.C. 7407(d)(1).[27] At the same time, for nonattainment areas, EPA must establish schedules for States to submit state implementation plans. 42 U.S.C. 7502(b). EPA may establish classifications for nonattainment areas and must establish their attainment dates. 42 U.S.C. 7502(a); see also 42 U.S.C. 7511(a)(1). States develop, for EPA approval or disapproval, their SIPs to implement the NAAQS by the applicable attainment dates. See 42 U.S.C. 7410(a) and (k), 7502(c). Under that statutory structure, NAAQS implementation proceeds through a careful decisionmaking process that includes designation, setting dates for SIP submissions, classifying nonattainment areas, developing SIPs, setting attainment dates, and obtaining EPA's approval of the SIPs. EPA's expression of its views, in a regulatory preamble, on some aspects of that future process cannot reasonably be viewed as completing any of the discrete steps that make up that process.

EPA did not take action in the rule under review to designate, classify, or set attainment dates for any areas, to set schedules for SIP submissions, or to approve or disapprove any SIP. Thus, EPA's preamble statements do not mark the consummation of any part of the agency's implementation process. They do not conclude the agency's thinking on how it may implement the revised ozone standard, or precisely whether or how implementation of the revised eight-hour standard may be affected by any Subpart 2 provisions. EPA's deliberations on those matters are ongoing and have not yet resulted in final agency action that is ripe for judicial review.

The preamble statements also do not satisfy the second *Bennett* requirement that "the action must be one by which 'rights or obligations have been determined,' or from which

[27] Congress slightly modified this schedule in 1998 with respect to the revised standards at issue here. Pub. L. No. 105-178, §§ 6101(b), 6102(c), 6103(a)-(b), 112 Stat. 463-465.

'legal consequences will flow.'" 520 U.S. at 178. The court of appeals concluded that EPA's preamble statements respecting future implementation were final action because by "promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states * * * [and] those areas that do not comply will ultimately be required to do so." Pet. App. 78a. Any obligations triggered by promulgation of the NAAQS arise, however, regardless of what EPA said, or did not say, in the preamble about implementation. No legal consequences flow from the preamble statements themselves. EPA's views on implementation will produce tangible legal consequences only when EPA takes actual steps to implement the NAAQS through the prescribed rulemaking processes. Affected parties will be able to obtain judicial review of EPA's judgments on implementation once EPA takes final action that actually creates new legal obligations.

C. EPA's Preamble Statements Regarding Implementation Of The Eight-Hour Ozone Standard Are Not Ripe For Review

Even if EPA's preamble statements were final agency action, that purported agency action would not be ripe for judicial review. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has oeen formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-733 (1998) (quoting *Abbott Labs.*, 387 U.S. at 148-149).

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc.*

Servs., Inc., 509 U.S. 43, 57 n.18 (1993). To determine whether a controversy is ripe a court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas* v. *United States*, 523 U.S. 296, 301 (1998). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 300.

The court of appeals' concerns regarding how to reconcile Subparts 1 and 2 are not yet fit for review because, at this stage, the matter is too abstract, as demonstrated by the breadth and generality of the court's conclusion. EPA has neither fully developed its interpretation nor attempted to exercise its authority to implement the eight-hour ozone standard. See, *e.g.*, *Ohio Forestry*, 523 U.S. at 732-738; *Abbott Labs.*, 387 U.S. at 148-149.

The interplay among Sections 107(d), 172, and 181, and other relevant provisions of the Act, is complex. As we have explained, EPA expressed views on selected implementation provisions of the Act to respond to comments in the ozone rulemaking that those provisions negate EPA's NAAQS revision authority. A court's consideration of whether and how Section 181(a) and other sections of Subpart 2 may affect EPA's authority under the various provisions of Subpart 1 would be on much surer footing if the reviewing court had the benefit of EPA's full explanation of how and why it has implemented the revised ozone standard in a particular way, after the completion of a relevant decisional process (including any required public notice and comment) that actually implements the standard.[28]

---

[28] The Court has recognized that deferring review is appropriate where "the need for some further procedure, some further contingency of application or interpretation . . . serve[s] to make remote the issue which was sought to be presented to the Court." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 51-52 (1976) (Brennan, J., concurring) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 528 (1961) (Harlan, J., dissenting)); see, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-164 (1967) (interpretive rule not ripe for review). In this case, "[d]etermination of the scope * * * of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954). See *ACLU* v. *FCC*, 823 F.2d 1554, 1577 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Office of Communication of United Church of Christ* v. *FCC*, 826 F.2d 101, 106 (D.C. Cir. 1987).

The case for deferring review is especially strong here because the resolution of any tension between the various provisions in Subparts 1 and 2 may depend upon the circumstances of the particular nonattainment area at issue. See, *e.g.*, Pet. App. 40a-41a (expressing concern regarding the interplay and future application of Sections 172(a) and 181(a)(1) on Los Angeles). Deferring review of those implementation issues would allow EPA the opportunity to work through the various implementation provisions in concrete settings, reconcile conflicts, make policy judgments, and apply its expertise as necessary to resolve ambiguities in the statute. See *Ohio Forestry*, 523 U.S. at 733-734; *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984).

Judicial intervention at this point would also "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." *Standard Oil*, 449 U.S. at 242. Deferring review would facilitate future judicial review by reducing the issues to manageable proportions. The importance of a concrete setting for judicial review is underscored by the court's own confusion regarding EPA's interpretation, compare Pet. App. 43a-44a, with *id.* at 80a-81a and *id.* at 87a-88a, its reliance upon predicted future outcomes in particular areas, *id.* at 40a-41a, and the extreme breadth and lack of clarity of the court's ultimate conclusion that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2," *id.* at 81a.

Finally, deferring review will not work substantial hardship. EPA's expression of its views in the preamble created

no obligations that adversely affect any parties' day-to-day operations, and the parties will have ample opportunity to bring their legal challenge when any harm is more immediate and certain. See *Lujan*, 497 U.S. at 891; *Ohio Forestry*, 523 U.S. at 733-734; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967).

III. THE COURT OF APPEALS IMPROPERLY RESTRICTED EPA'S AUTHORITY TO IMPLEMENT THE REVISED OZONE STANDARD

If this Court were to reach the merits of the court of appeals' decision respecting implementation, it should reverse that decision. The court of appeals correctly upheld EPA's authority to revise the ozone NAAQS, and it correctly concluded that the CAA requires EPA to designate all areas of the Nation as attainment, nonattainment, or unclassifiable areas for the revised standard. Pet. App. 34a-37a. The court erred, however, in concluding that EPA could not enforce a more protective ozone standard in those designated areas. See *id.* at 37a-44a. On rehearing, the court modified its views and concluded that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." *Id.* at 81a. Judge Tatel explained in his partial concurrence that the panel's revised decision allows EPA to enforce its revised ozone standard under Subpart 1 in an area only after that area attains the one-hour standard under Subpart 2. *Id.* at 89a (Tatel, J., concurring). But even under that view, the court of appeals' decision is incorrect.

As we explain below, EPA reasonably interprets the CAA to require that EPA implement a revised ozone standard under Subpart 1. The revised NAAQS is a *National* Ambient Air Quality Standard that should apply throughout the entire Nation, for all members of the public, including those that reside in areas that do not currently attain the one-hour standard. There is no warrant for categorically

requiring that EPA ensure compliance with the very one-hour ozone standard that it found inadequate to protect public health before it can require efforts to attain the more protective revised ozone NAAQS.

A. The Clean Air Act Authorizes EPA To Implement The Revised Ozone NAAQS Under Subpart 1 Of Part D

Title I of the CAA, 42 U.S.C. 7401-7515 (1994 & Supp. III 1997), governs the promulgation and implementation of all NAAQS, and it directs that the NAAQS be attained "as expeditiously as practicable." 42 U.S.C. 7502(a)(2), 7511(a)(1). Part A expressly requires EPA to reconsider and, if appropriate, revise the NAAQS—including the pre-existing one-hour ozone standard—every five years. 42 U.S.C. 7409(d)(1); Pet. App. 34a. Subpart 1 of Part D, which governs implementation for "Nonattainment Areas in General," sets out specific provisions for implementing revised NAAQS. 42 U.S.C. 7502(a)(1). It follows that EPA's revised ozone NAAQS would be subject to implementation under Subpart 1. The court of appeals' counter-intuitive conclusion —that the revised ozone NAAQS must be implemented in conformity with Subpart 2, which addresses the former ozone NAAQS—conflicts at the outset with the basic framework of the Act.

Subpart 1's specific language reveals that the court's construction is wrong. Section 172(a) establishes classifications and attainment dates for all areas designated nonattainment "pursuant to section [107(d)] with respect to any * * * revised standard, including a revision of any standard in effect on November 15, 1990." 42 U.S.C. 7502(a)(1)(A). Section 172(a)(1)(A)'s reference to "any" revised standard includes a revision of the one-hour ozone standard, because that standard was "in effect on November 15, 1990." See 40 C.F.R. 50.9 (1990). Thus, Section 172(a), on its face, makes clear that Subpart 1 governs the selection of classifications and attainment dates for a revised ozone NAAQS.

The court of appeals questioned that interpretation because Sections 172(a)(1)(C) and 172(a)(2)(D) provide that EPA's classification and attainment date-setting authority under Section 172(a) does not apply to "nonattainment areas for which classifications [or "attainment dates"] are specifically provided under other provisions of [Part D]." 42 U.S.C. 7502(a)(1)(C) and (a)(2)(D). See Pet. App. 37a. The court of appeals noted that Section 181(a)(1), in Subpart 2 of Part D, provides that "each area designated nonattainment for ozone pursuant to [Section 107(d)]" is to be classified and given an attainment date under its Table 1. 42 U.S.C. 7511(a)(1). See Pet. App. 38a. In the court's view, Section 181(a)(1) dictates that all areas that are designated as nonattainment for ozone under Section 107(d), including areas designated under the revised ozone NAAQS, are subject to Subpart 2's provisions. *Id.* at 38a-39a. Congress, however, adequately answered the court's concern over those seemingly competing references.

Section 181(a)—which is contained in Subpart 2 of Part D—"specifically provide[s]" classifications and attainment dates for only a particular subset of ozone "nonattainment areas." Section 181(a)'s caption states that the Section provides "Classification and attainment dates for *1989 nonattainment areas*." 42 U.S.C. 7511(a) (emphasis added). The 1989 nonattainment areas are, of course, the areas that were subject to the *one-hour ozone standard* then in force. Congress enacted Subpart 2 out of concern over the continuing nonattainment of the one-hour ozone standard that existed when it enacted the 1990 Amendments. It plainly crafted Section 181(a)(1) to address that specific problem. The title of Section 181(a) clarifies that Section's reach and resolves any confusion about whether Subpart 2 governs implementation of the revised ozone NAAQS. See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388-389 (1959).

The court of appeals' contrary conclusion would lead to unworkable and absurd results. For example, Section 181(a)(1) sets attainment dates and classifications based on an area's "design value," which is an air quality measure that specifically applies to the one-hour ozone standard that was in existence in 1990. See 42 U.S.C. 7511(a)(1).[29] It would make no sense—and, indeed, would be impossible—to classify areas and set their attainment dates for the revised NAAQS's eight-hour standard using an air quality measurement based upon one-hour averaging. The eight-hour NAAQS rests on an entirely different averaging methodology, statistical form, and concentration. See 40 C.F.R. 50.10 & Pt. 50 App. I, ¶¶ 2-3.

In addition, Section 181(a) calculates attainment dates for areas based upon a fixed number of years from 1990. See 42 U.S.C. 7511(a)(1) (Table 1). Section 181(a)(1) makes reference to 1990 because it establishes attainment dates for the "1989 nonattainment areas," which had not attained the one-hour ozone standard at the time of enactment of the 1990 Amendments. That timetable makes no sense in calculating attainment dates for a revised NAAQS. Indeed, many of Section 181(a)(1)'s attainment dates, including those for "marginal," "moderate," and "serious" nonattainment areas, have already passed. See 42 U.S.C. 7511(a) (Table 1).[30]

---

[29] See H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 197 (1990). ("The primary ozone standard, established to protect human health, is a daily maximum hourly concentration of 0.12 parts per million (ppm) [*i.e.*, the one-hour ozone standard]. Compliance with the ozone standard is evaluated on the basis of a 'design value,' which is the fourth highest one-hour ozone reading over three years."). The court of appeals correctly noted this fact. See Pet. App. 32a n.6.

[30] The text of Section 181(b), 42 U.S.C. 7511(b), provides further evidence that Section 181 applies only to the implementation of the one-hour standard. Section 181(b) recognizes that areas initially designated shortly after enactment of the 1990 Amendments as "attainment" areas for the one-hour ozone standard may be redesignated as "nonattainment" if, for example, air quality in the area deteriorates. See 42 U.S.C.

In light of those considerations, Section 181(a)(1) cannot reasonably be construed to have "specifically provided" classifications and attainment dates for the eight-hour ozone standard. Rather, the text and context of Section 181(a) indicate that Congress intended Section 181(a)(1) to provide classifications and attainment dates only for "1989 nonattainment areas" that had been designated under the then-current one-hour ozone standard. See 42 U.S.C. 7407(d)(1)(C) and (4)(A). EPA's view that Congress intended EPA to implement the revised NAAQS under Subpart 1 and to implement the former NAAQS under Subpart 2 represents, at a minimum, a permissible and reasonable accommodation of the provisions entrusted to the agency's care. See, *e.g.*, *Chevron*, 467 U.S. at 842-845.

B. Delaying Implementation Of The Revised NAAQS Until The Previous Standard Is Attained Conflicts With The Clean Air Act's Requirement That All NAAQS Be Attained "As Expeditiously As Practicable"

The court of appeals also erred in its apparent conclusion that EPA cannot implement the revised ozone NAAQS in an area until that area has had an opportunity to meet the attainment dates for the one-hour ozone standard. See Pet. App. 89a. The court overlooked that the attainment dates set out in Section 181(a)(1) establish the maximum period of time allowed for attainment. See 42 U.S.C. 7511(a)(1). Both

7407(d)(3). Section 181(b) allows for adjustment of the attainment date set out in Section 181(a)(1)'s "Table 1" in that circumstance. See 42 U.S.C. 7511(b). Section 181(b) makes no provision, however, for using Table 1 if EPA promulgates a revised ozone standard and designates an area as "nonattainment" under the revised standard. Section 181(b) expressly applies only to areas that were initially designated as "attainment" for the one-hour ozone standard pursuant to 42 U.S.C. 7407(d)(4) and are later redesignated as "nonattainment" for that standard under 42 U.S.C. 7407(d)(3). See 42 U.S.C. 7511(b). Section 181(b) does not apply to designations for revised NAAQS, which are made under 42 U.S.C. 7407(d)(1).

Subpart 1 and Subpart 2 require that all areas attain the NAAQS "as expeditiously as practicable." CAA §§ 172(a)(2), 181(a)(1), 42 U.S.C. 7502(a)(2), 7511(a)(1); see H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. at 1, at 229; S. Rep. No. 228, 101st Cong., 1st Sess. 37 (1989). EPA accordingly is justified in concluding that it should implement the revised ozone standard without delay throughout the Nation in accordance with the timing provisions set out in Subpart 1. 42 U.S.C. 7502(a)(2).

The court of appeals expressed concern that a practical conflict could conceivably arise for the Los Angeles area between Subpart 1's deadline to attain the revised ozone standard and Subpart 2's attainment date for the one-hour ozone standard. See Pet. App. 41a. It is entirely reasonable, however, for Congress to require that, once EPA determines that a revised NAAQS is necessary to protect public health, the revised NAAQS should be attained without avoidable delay notwithstanding the timetable that Congress envisioned for the standard then in effect.[31]

Moreover, the court of appeals has overstated the practical problem that the revised NAAQS would pose. As we have noted, the deadlines for attainment in Section 181(a)(1) are only outer time limits for attaining the one-hour standard. See 42 U.S.C. 7511(a)(1). Los Angeles would be required to attain the revised NAAQS under Subpart 1 no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard. Compare CAA § 172(a)(2), 42 U.S.C. 7502(a)(2), with CAA § 181(a)(1) and (5), 42 U.S.C. 7511(a)(1) and (5). That situation, however, does not necessarily pose any practical problems. For

[31] The court of appeals' concerns may have arisen from a mistaken belief that it is unusual for areas to be subject to more than one NAAQS at any given time. To the contrary, it is common for an area to be subject to simultaneous implementation of two or more NAAQS, including two NAAQS governing the same pollutant. See, *e.g.*, 40 C.F.R. 50.4(a)-(b), 50.8(a)(1)-(2).

example, it may be "practicable"—and preferable from an implementing State's perspective—to achieve both the one-hour ozone standard and the revised ozone standard at approximately the same time. There is no reason to believe that Congress intended to preclude that approach.

In any event, the question of how to reconcile any competing compliance deadlines is clearly the type of issue that should first be addressed by EPA through future final action under the implementation process, including any required public notice and opportunity for comment. EPA's determinations can then be subject to judicial review in the appropriate court of appeals. See 42 U.S.C. 7607(b)(1). To the extent that there is tension between Subparts 1 and 2, it will be up to EPA to harmonize the applicable provisions, and the courts must defer to EPA's reasonable judgment on the matter. *Chevron*, 467 U.S. at 845. Those issues, however, are properly reserved for another day. Regardless of how those provisions may ultimately be applied, they certainly do not justify the court of appeals' conclusion that Congress prohibited EPA from implementing the revised ozone standard in an area until it attains the very standard that EPA found was not adequate to protect public health.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

DAVID J. KAPLAN
MARY F. EDGAR
Attorneys

GARY S. GUZY
General Counsel

GERALD K. GLEASON
MICHAEL L. GOO
JAN M. TIERNEY
KEVIN W. MCLEAN
Attorneys
Environmental Protection Agency

JULY 2000

APPENDIX

Excerpts From Federal Register Notice: National Ambient Air Quality Standards For Ozone; Final Rule (62 Fed. Reg. 38,856 (1997))

1. In discussing its jurisdiction to review EPA's implementation of the eight-hour ozone NAAQS (Pet. App. 77a-78a), the court of appeals cited the following passage from the preamble of the Federal Register Notice describing EPA's Final Rule: National Ambient Quality Standards For Ozone:

D. 1990 Act Amendments

Contrary to the view expressed in some public comments, EPA maintains that the provisions of subpart 2 of Part D of Title I of the Clean Air Act, enacted in 1990, do not preclude EPA from revising the O_3 standard. The provisions of subpart 2 simply do not limit EPA's clear authority under section 109 to revise the standard.

The basic contention of the commenters is that because the provisions of subpart 2 are linked to the current 1-hour, 0.12 ppm O_3 standard, they prohibit EPA from revising the O_3 standard. These provisions, however, do not lead to such a conclusion. Moreover, the view expressed in these comments ignores provisions indicating that Congress believed that EPA could revise the O_3 NAAQS.

At the outset, it should be noted that Congress expressly authorized EPA to revise any ambient air quality standard in section 109. That section, which requires EPA to review and revise, as appropriate, each NAAQS every 5 years, contains no language expressly or implicitly prohibiting EPA from revising a NAAQS. If Congress had intended to preclude EPA from reviewing and revising a NAAQS, which is one of EPA's

fundamental functions, Congress would have specifically done so. Clearly, Congress knew how to preclude EPA from exercising otherwise existing regulatory authority and did so in other instances. See section 202(b)(1)(C)(expressly precluding EPA from modifying certain motor vehicle standards prior to model year 2004); section 112(b)(2)(preventing EPA from adding to the list of hazardous air pollutants any air pollutants that are listed under section 108(a) unless they meet the specific exceptions of section 112(b)(2)); section 249(e)(3), (f) and section 250(b)(limiting EPA's authority regarding certain clean-fuel vehicle programs). No such language was included in either section 109 or elsewhere in the Act and no such implication may properly be based on the provisions of subpart 2 of Part D of Title I.

Second, other provisions of the Act expressly contemplate EPA's ability to revise any NAAQS, and provide no indication that such ability is limited to standards other than those whose implementation is the subject of subparts 2, 3 and 4 of Part D. For example, section 110(a)(2)(H)(i) provides that SIPs are to provide for revisions "from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard * * *." Section 107(d)(1)(A) provides a process for designating areas as attainment, nonattainment, or unclassifiable "after promulgation of a new or revised standard for any pollutant under section 109 * * *." Section 172(e) addresses modifications of national primary ambient air quality standards. Finally, section 172(a)(1) expressly contemplates that EPA may revise a standard in effect at the time of enactment of the 1990 Clean Air Act Amendments. Section 172(a)(1)(A) provides EPA with authority to classify nonattainment areas on or after the designation of an area as nonattainment with respect to "any revised standard, including a revision of any

standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990." Plainly, Congress had no intention of prohibiting EPA from revising any of the ambient standards in effect at the time of the enactment of the 1990 amendments.

Third, the provisions of subpart 2 of Part D do not support the contention that they somehow preclude EPA from exercising its authority to revise the NAAQS under section 109. The fact that Congress laid out an implementation program for the O_3 standard existing at the time of the 1990 amendments in no way suggests that Congress intended to preclude EPA from exercising the authority it provided EPA to revise the NAAQS when the health data on which EPA bases such decisions warranted a change in the standard. Contrary to this contention, section 181(a) does not preclude the designation of areas as nonattainment for O_3 that have design values less than 0.121 ppm. EPA has designated as nonattainment numerous areas whose design value was less than 0.121 ppm, but which violated the existing 1-hour, 0.12 ppm O_3 standard. These areas, referred to as "nonclassifiable nonattainment areas," include "submarginal" areas (i.e., O_3 nonattainment areas with design values below 0.121 ppm), (See 57 FR 13498, 13524-27, April 16, 1992). These areas include areas that were designated nonattainment prior to the 1990 amendments and whose nonattainment designation Congress required to be continued after 1990. See section 107(d)(1)(C)(i). Clearly, Congress did not prohibit the designation of areas as nonattainment for O_3 with design values below 0.121 ppm; in fact, in some cases, Congress required it. Furthermore, the position advanced by the commenters would mean that, in effect, Congress in the 1990 amendments legislatively revised the then-existing 1-hour, 0.12 ppm O_3 standard to a 0.121 ppm standard. There is no indication that Congress intended to do that.

In addition, the fact that Congress directed EPA to use "the interpretation methodology issued by the Administrator most recently" before the date of the enactment of the Clean Air Act Amendments of 1990 in the context of subpart 2 does not add any support to the commenters' position; it merely shows that Congress intended the existing 1-hour, 0.12 ppm standard to be implemented in a specified way, not that Congress intended to preclude EPA from using its otherwise applicable authority to revise the standard.

The EPA also disagrees with the contention that sections 172(a)(1)(C) and (a)(2)(D), which provide that the general classification and attainment date provisions of section 172 do not apply to areas for which classifications or attainment dates "are specifically provided under other provisions of this part," support the conclusion that Congress intended to prohibit EPA from revising the O_3 standard. These provisions simply mean that where Congress elsewhere provided for specific classifications and attainment dates, as in the case of subpart 2 regarding the 1-hour, 0.12 ppm standard, EPA is not to modify those classifications or dates. The EPA is not purporting to do this. These provisions do not lead to the conclusion that because Congress established them for the O_3 standard in effect at the time of the 1990 amendments, Congress meant that EPA could not revise that standard in order to appropriately protect public health.

EPA does not accept the thesis that revising the O_3 standard forces EPA to violate other provisions of the Act and, therefore, is not an "appropriate" revision of the standard under section 109. Revising the O_3 standard in accordance with the language of section 109 does not result in EPA violating any provision of the Act. On the other hand, a determination by EPA that the O_3 standard should not be revised, even though EPA concludes that it

needs to be revised to protect public health with an adequate margin of safety, would violate section 109.

Also, EPA does not believe that carrying out the provisions of section 109 to set a new O_3 standard to protect public health with an adequate margin of safety somehow "risks undermining both perceptions and reality of the functioning of our democratic form of government." EPA is merely implementing the words of the Clean Air Act, a statute passed by the Congress and signed by the President. To refuse to revise the standard notwithstanding the need to protect public health as enunciated in section 109 would thwart the objectives of those who passed and signed the Clean Air Act on behalf of the American public.

Finally, for the reasons stated above, EPA's analysis of its ability to implement the revised O_3 standard under the provisions of subpart 1 of Part D of Title I does not support the view that Congress prohibited EPA from revising the standard. Congress clearly specified an approach to the implementation of the 1-hour, 0.12 ppm O_3 standard in the provisions of subpart 2 of Part D. EPA believes that the clear and express linkage of that approach to the 1-hour, 0.12 ppm standard indicates that it may implement a revised O_3 standard in accord with the general principles of subpart 1 of Part D, as informed by the no-backsliding principle embodied in section 172(e). That Congress directed specifically how EPA and the States should implement the 1-hour, 0.12 ppm O_3 standard does not carry with it the implication that Congress intended to prohibit EPA from exercising its otherwise clear and express authority to revise that standard in order to carry out one of its fundamental missions, the establishment of ambient air quality standards to protect public health with an ample margin of safety. If Congress had intended to prohibit EPA from exercising such a

fundamental authority it would have clearly specified (as it did in other instances) that EPA could not do so.

The EPA also disagrees with the contention that a revised O_3 standard may not be implemented for so long as the current 1-hour, 0.12 ppm O_3 standard remains in effect. The fact that the provisions of subpart 2 of Part D are focused on the implementation of the current standard does not mean that, if a new or revised O_3 standard is promulgated pursuant to section 109, the new standard could not simultaneously be implemented under the provisions of section 110 and subpart 1 of Part D, which apply regardless of the criteria pollutant of concern. There is no language in sections 181 or 182 that precludes the implementation of a different standard under other authority; those provisions simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard. EPA further notes that it has historically had more than one primary standard for criteria pollutants (e.g., annual and 24-hour PM_{10} and sulfur dioxide standards, and 8-hour and 1-hour CO standards) and believes that had Congress wanted to preclude EPA from implementing two primary O_3 standards simultaneously it would have expressly precluded EPA from doing so. Thus, EPA does not believe that it must repeal the 1-hour, 0.12 ppm O_3 standard before it can promulgate and implement a new primary O_3 standard.

62 Fed. Reg. 38,884-38,885 (1997).

2. The preamble of the Federal Register Notice also describes EPA's separate final rule, 40 C.F.R. 50.9(b), respecting future enforcement of the one-hour ozone NAAQS. The preamble contains the following passage, which provides an additional discussion of implementation of the ozone NAAQS:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and

recommendations of CASAC, public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

The 8-hour, 0.08 ppm primary standard will be met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentration is less than or equal to 0.08 ppm. Data handling conventions are specified in a new Appendix I to 40 CFR part 50 as discussed in Unit VI below.

In the proposal, EPA proposed that the revocation of the existing 1-hour O_3 standard be delayed for certain purposes until EPA had approved State Implementation Plans to implement the new 8-hour O_3 standard. EPA had proposed continuing the applicability of the 1-hour standard in this way in order to facilitate continuity in public health protection during the transition to a new standard. (See Memorandum from John S. Seitz to Mary D. Nichols, November 20, 1996; Docket No. A-95-58, item II-B-3.) Also, at the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996) under which the provisions of subpart 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.

In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the

provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.

To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should remain applicable to areas that are not attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

62 Fed. Reg. 38,873 (1997).

Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attys. General, N.J.
Richard J. Hughes Justice
Complex 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

EDWARD G. BOHLEN
Assistant Atty. General, Mass.
200 Portland Street
Boston, MA 02114
(617) 727-2200, ext. 3358

LISA HEINZERLING
Counsel of Record
Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9115

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Statutory and Regulatory Background 1

1. Establishing and Revising the NAAQS 2

2. Implementing the NAAQS 5

3. History of the Clean Air Act and the NAAQS Program 7

B. Rulemakings on Particulate Matter and Ozone 20

1. Particulate Matter 20

2. Ozone 21

C. The Court of Appeals' Decision 24

SUMMARY OF ARGUMENT 26

ARGUMENT 28

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION. 28

A. The Language And Purpose Of The Clean Air Act Significantly Constrain Agency Discretion. 29

B. The History Of The Clean Air Act Unequivocally Shows That Congress Has Not Forsaken Its Legislative Duties. 36

C. The Context Of The Clean Air Act–The Control Of Air Pollution In Conditions Of Uncertainty–Would Be A Particularly Inappropriate Setting For A Reworking Of The Nondelegation Doctrine. 38

II. THE LOWER COURT'S DECISION CONSTRAINING ENFORCEMENT OF THE REVISED OZONE STANDARD IS INCONSISTENT WITH THE CLEAN AIR ACT'S LANGUAGE AND PURPOSES, AND WITH EPA'S REASONABLE INTERPRETATION OF THE ACT. .. 43

CONCLUSION 50

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 36, 39
American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 29, 34
Buttfield v. Stranahan, 192 U.S. 470 (1904) 35
Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 45, 50
Clinton v. City of New York, 524 U.S. 417 (1998) 36
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976) 19
Field v. Clark, 143 U.S. 649 (1892) 33
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 29, 41
Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 30, 31
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 28
Lichter v. United States, 334 U.S. 742 (1948) 35, 39, 40
Loving v. United States, 517 U.S. 748 (1996) 29, 31, 36, 38, 42
Mistretta v. United States, 488 U.S. 361 (1989) 29, 31, 35, 42
National Broad. Co. v. United States, 319 U.S. 190 (1943) 29
OPP Cotton Mills v. Administrator Wage & Hour Div., Dept. of Labor, 312 U.S. 126 (1941) 35
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 36, 39
Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 29, 31, 35, 40, 41, 43
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 40
Touby v. United States, 500 U.S. 160 (1991) 29, 31, 35, 40, 41, 43
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 6
Union Bridge Co. v. United States, 204 U.S. 364 (1907) 41
Union Electric Company v. EPA, 427 U.S. 246 (1976) 5
United States v. Rock Royal Co-op, Inc., 307 U.S. 533 (1939) 33
United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 29
Yakus v. United States, 321 U.S. 414 (1944) 29, 35

Constitution and Statutes:

U.S. Const. art. I, § 1 24

Constitution and Statutes—Continued:

Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162 8
Air Pollution Control Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 ..... 7, 8
Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. ..... 10, 11, 13, 18
Clean Air Act, 42 U.S.C. 7401
§ 107(d)(1), 42 U.S.C. § 7407(d)(1) 5, 26, 44
§ 107(d)(1)(A)(i)-(iii), 42 U.S.C. § 7407(d)(1)(A)(i)-(iii) 5
§ 107(d)(4), 42 U.S.C. § 7407(d)(4) 5, 49
§ 108(a)(1), 42 U.S.C. § 7408(a)(1) 32
§ 108(a)(1)(A)-(B), 42 U.S.C. § 7408(a)(1)(A)-(B) 3
§ 108(a)(2), 42 U.S.C. § 7408(a)(2) 3, 9, 30, 31
§§ 108-109, 42 U.S.C. §§ 7408-7409 2
§ 109(a)(1), 42 U.S.C. § 7409(a)(1) 4, 18, 32
§ 109(b)(1), 42 U.S.C. § 7409(b)(1) 2, 4, 30, 31, 32
§ 109(b)(2), 42 U.S.C. § 7409(b)(2) 2
§ 109(d)(1), 42 U.S.C. § 7409(d)(1) 4, 33
§ 109(d)(2)(B)-(C), 42 U.S.C. § 7409(d)(2)(B)-(C) 3
§ 110, 42 U.S.C. § 7410 ..... 5, 35
§ 110(a)(1), 42 U.S.C. § 7410(a)(1) 5
§ 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) 6, 43, 47
§ 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A) 6, 43
§ 179, 42 U.S.C. § 7509 35
§ 181(a)(1), 42 U.S.C. § 7511(a)(1) 6, 7, 26, 44, 46, 47, 48, 49, 50
§§ 181-185B, 42 U.S.C. §§ 7511-7511f 44
§§ 181-192, 42 U.S.C. §§ 7511-7514a 6
§§ 186-193, 42 U.S.C. §§ 7512-7515 6
§ 302(h), 42 U.S.C. § 7602(h) 2
§ 307(d)(3), 42 U.S.C. § 7607(d)(3) 3, 5, 34
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 ..... 18, 19
Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 ... 9, 10, 13, 14
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 ..... 12, 13, 14, 18, 19

Constitution and Statutes—Continued:

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82. 40
Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, 79 Stat. 992 ..... 10, 13
Reorg. Plan No. 3 of 1970, 5 U.S.C.A. App. (Supp. 1992) 12
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §§ 6101-04, 112 Stat. 463-65 (1998) 19, 20

Federal Register and Code of Federal Regulations:

40 C.F.R. §§ 50.4-50.12 3
NAAQS for Carbon Monoxide, 50 Fed. Reg 37,484 (1985) 4
NAAQS for Carbon Monoxide, 59 Fed. Reg. 38,906 (1994) 4
NAAQS for Lead, 43 Fed. Reg. 46,246 (1978) 4
NAAQS for Nitrogen Dioxide, 50 Fed. Reg. 25,532 (1985) 4
NAAQS for Nitrogen Dioxide, 61 Fed. Reg. 52,852 (1996) 4
NAAQS for Ozone, 62 Fed. Reg. 38,856 (1997) 3, 4, 23, 24, 34
NAAQS for Particulate Matter , 52 Fed. Reg. 24,854 (1987) 20
NAAQS for Particulate Matter, 62 Fed. Reg. 38,652 (1997) 3, 4, 20, 21, 24
NAAQS for Photochemical Oxidants, 44 Fed. Reg. 8202 (1979) 4, 22, 46
NAAQS for Sulfur Oxides, 58 Fed. Reg. 21,351 (1993) 4
NAAQS for Sulfur Oxides, 61 Fed. Reg. 25,566 (1996) 4
NAAQS, 36 Fed. Reg. 8186 (1971) 20, 22, 30
Proposed NAAQS for Ozone, 61 Fed. Reg. 65,716 (1996) 22
Proposed NAAQS for Particulate Matter, 61 Fed. Reg. 65,638 (1996). 20, 21

Legislative History

116 Cong. Rec. 32,913 (1970) (statement of Sen. Muskie) 16
Air Pollution Problems: Hearings Before the House Select Comm. on Small Business, 84th Cong., 2d Sess. (1956) 8
Air Pollution – 1970: Hearings Before the Subcomm. on Air and Water - Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (March 17, 1970) 12

Legislative History- Continued:

Air Pollution – 1970: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (May 27, 1970) 17
H.R. 17255, 91st Cong. (1970) 13
H.R. Rep. No. 95-294 (1st Sess. 1977) 19
H.R. Rep. No. 101-490, at 229 (1990) 50
S. Rep. No. 91-1196 (2d Sess. 1970) 13, 17, 18
Secretary of Health, Education, and Welfare, Progress in the Prevention and Control of Air Pollution, S. Doc. No. 91-64 (2d. Sess. 1970) 11
Staff of Senate Comm. on Public Works, 88th Cong., 1st Sess., *A Study of Pollution – Air* (Comm. Print 1963) 8

Other Sources:

Air Pollution Control Office, Environmental Protection Agency, Pub. No. AP-84, Air Quality Criteria for Nitrogen Oxides (1971) 14, 17, 42
Memorandum from William G. Laxton, Director, Technical Support Division, EPA, "Ozone and Carbon Monoxide Design Value Calculations" (June 18, 1990) <http:www.epa.gov/airprogm/oar/oaqps/greenbk/laxton.html>. 46
National Air Pollution Control Administration, HEW, Guidelines for the Development of Air Quality Standards and Implementation Plans (1969) 16
National Air Pollution Control Administration, HEW, Pub. No. AP-50, Air Quality Criteria for Sulfur Oxides (1969) 11
National Air Pollution Control Administration, HEW, Pub. No. AP-63, Air Quality Criteria for Photochemical Oxidants (1970) 12, 14, 15, 16, 17, 42
National Air Pollution Control Administration, HEW, Pub. No. AP-64, Air Quality Criteria for Hydrocarbons (1970) 12, 17

Other Sources- Continued:

National Air Pollution Control Administration, HEW, Pub. No. AP-49, Air Quality Criteria for Particulate Matter (1969) 11, 14, 15, 16, 17
National Air Pollution Control Administration, HEW, Pub. No. AP-62, Air Quality Criteria for Carbon Monoxide (1970) 12, 14, 15, 16, 17, 42
Office of Research and Development, Environmental Protection Agency, Air Quality Criteria for Lead (1977) 42
Public Health Service, HEW, Pub. No. 1619, Air Quality Criteria for Sulfur Oxides (1967) 10, 11, 14, 15, 16, 42
1 William H. Rodgers, *Environmental Law* (2d ed. 1994) 7, 10
Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97 (1987) 35
H.H. Schrenk, U.S. Public Health Service, Air Pollution in Donora, Pa. (1949) 8
State Petitioners' Appendix to Petition for Certiorari 24, 25, 26, 39, 45
Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, Closure Letter to Hon. Carol M. Browner (Nov. 30, 1995) <www.epa.gov/science1/casac02.pdf> 23

BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

STATEMENT

A. Statutory and Regulatory Background

The National Ambient Air Quality Standards (NAAQS) form the centerpiece of what many consider to be this country's single most important environmental program. These standards protect public health by governing the quality of the outdoor air throughout the nation. They address the pollutants–sulfur oxides, nitrogen oxides, lead, carbon monoxide, ozone, and particulate matter–that are among the best-studied, most pervasive, and most diversely harmful of the byproducts of industrial society. A large part of the federal regulation that takes place under the Clean Air Act, and most of the state regulation, have as their objective the attainment of air quality consistent with the NAAQS. This case, which involves the NAAQS for particulate matter and ozone, places in issue the processes for both establishing and implementing the NAAQS.

1. Congress has devised an intricate and highly constrained process for the establishment and revision of the NAAQS by the Environmental Protection Agency (EPA). This process prescribes the factors EPA is to consider in setting the NAAQS; requires a margin of safety to address the problem of scientific uncertainty; targets only ubiquitous, harmful air pollutants; mandates exhaustive scientific inquiry into the consequences of these pollutants for human health and welfare; requires EPA to consult with a scientific committee formed to advise the agency on the consequences of and alternative regulatory responses to air pollution; requires extensive opportunity for public review and comment; and provides for judicial review.

2. The process for implementing the NAAQS is equally elaborate. Although the states have the primary responsibility

to devise and implement the programs to achieve the NAAQS, the Clean Air Act significantly constrains the timing and content of the process of implementation. For areas that had not met the NAAQS that existed when the Act was amended in 1990, the Act dictated highly specific deadlines and control measures. Most of these deadlines have now passed.

3. In its essence, this case questions whether Congress has forsaken its legislative duties in assigning authority to an executive agency. In this setting, it is important to understand Congress's working relationship with the regulatory program under scrutiny. Today's NAAQS program is the combined result of numerous separate Acts of Congress passed over a period of decades. Each time Congress has revised the statutory provisions at issue here, it has done so in direct response to some agency action (or inaction), sometimes ratifying and sometimes adjusting the agency's course. In many instances, Congress has fine-tuned the statutory requirements in light of the executive's experiences in attempting to address air pollution in the face of persistent scientific uncertainty. Review of the historical development of the NAAQS program thus reveals an exceedingly close and fruitful working relationship between Congress and the executive in shaping and refining national policy with respect to air pollution.

1. Establishing and Revising the NAAQS

The Clean Air Act requires the Administrator of EPA to establish and periodically revise NAAQS for a limited subset of air pollutants. Clean Air Act (CAA) §§ 108-109, 42 U.S.C. §§ 7408-7409. These standards identify the maximum permitted level of the regulated pollutants in the outside air.[1]

[1]Primary NAAQS protect the public health. CAA § 109(b)(1), 42 U.S.C. §7409(b)(1). Secondary standards protect public welfare, 42 U.S.C. §7409(b)(2), broadly defined to include, for example, effects on soils, crops, and wildlife. CAA § 302(h), 42 U.S.C. § 7602(h). The primary and secondary standards at issue here are identical. *See* NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,653 (1997); NAAQS for Ozone, 62 Fed. Reg. 38,856 (1997).

NAAQS may be set only for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." CAA § 108(a)(1)(A)-(B), 42 U.S.C. § 7408(a)(1)(A)-(B). Today, NAAQS exist for six pollutants: particulate matter (PM), sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, and lead. 40 C.F.R. §§ 50.4 - 50.12.

The Clean Air Act requires extensive scientific inquiry into the nature and severity of harm caused by an air pollutant before a NAAQS can be set. The Act requires, first, that air quality "criteria" be developed for pollutants in the NAAQS program. (Hence the term "criteria pollutants.") The air quality criteria–which are described in a "criteria document" prepared by the agency–must reflect "the latest scientific knowledge" indicating the "kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." CAA § 108(a)(2), 42 U.S.C. §7408(a)(2).

The Act requires, in addition, that a scientific advisory committee–the Clean Air Scientific Advisory Committee (CASAC)–review the air quality criteria and NAAQS. CASAC must recommend to the Administrator any new or revised NAAQS that may be appropriate in light of the statutory requirements and describe the areas in which "additional knowledge" is required to evaluate any NAAQS. CAA §109(d)(2)(B)-(C), 42 U.S.C. § 7409(d)(2)(B)-(C). In setting the NAAQS, the Administrator may significantly depart from CASAC's recommendations only if she explains why she has done so. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3).

The NAAQS themselves must be "based on" the air quality criteria. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The NAAQS are standards the attainment and maintenance of which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

The Clean Air Act directs the Administrator to review the NAAQS every five years. CAA § 109(d)(1), 42 U.S.C. §7409(d)(1). Based on this review, the Administrator may promulgate a new NAAQS, or revise an existing one. 42 U.S.C. § 7409(a)(1). No new pollutant has been regulated under the NAAQS program since 1978, when the NAAQS for lead was issued.[2] Pursuant to its obligation of periodic review, however, EPA has undertaken multiple reviews and revisions of the criteria and NAAQS for the six criteria pollutants.[3]

In setting any NAAQS, EPA must specify at least three different regulatory parameters.[4] First, EPA must specify the concentration *level* for a pollutant (e.g., *X* parts per million). Second, EPA must specify an *averaging time* for concentrations of the pollutant (e.g., one hour, 24 hours, one year, etc.). Finally, the agency must specify a "*form*," which is the air quality statistic used to determine compliance with the standard (e.g., no more than one exceedance per year). The form of a NAAQS is at once an integral part of the standard itself and an essential step towards enforcement.

---

[2] NAAQS for Lead, 43 Fed. Reg. 46,246 (1978).

[3] *See* 62 Fed. Reg. 38,856 (1997) (revising ozone NAAQS); 62 Fed. Reg. 38,366 (1997) (revising particulate matter NAAQS); 61 Fed. Reg. 52,852 (1996) (reviewing nitrogen dioxide NAAQS); 61 Fed. Reg. 25566 (1996) (reviewing sulfur oxides NAAQS); 59 Fed. Reg. 38,906 (1994) (reviewing carbon monoxide standard); 58 Fed. Reg. 21,351 (1993) (reviewing sulfur oxides NAAQS); 52 Fed. Reg. 24,634 (1987) (revising PM NAAQS); 50 Fed. Reg 37,484 (1985) (reviewing carbon monoxide NAAQS); 50 Fed. Reg. 25,532 (1985) (reviewing nitrogen dioxide NAAQS); 44 Fed. Reg. 8202 (1979) (revising photochemical oxidants NAAQS); 43 Fed. Reg. 46,246 (1978) (promulgating new NAAQS for lead).

[4] *See, e.g.*, NAAQS for PM, 62 Fed. Reg. at 38,666-68.

2. Implementing the NAAQS

The NAAQS themselves do not place limits on any source of pollution. Thus, once the NAAQS are set, attention shifts to achieving them. Although the Clean Air Act gives the states the primary responsibility to implement the programs to achieve the NAAQS, *see* CAA § 110, 42 U.S.C. § 7410, the statute also significantly constrains the timing and content of the process of implementation.

Designation; Attainment Status. Implementation begins with the designation of areas according to whether their air quality complies with the NAAQS. The three possible designations are "attainment" (area meets the NAAQS), "nonattainment" (area does not meet the NAAQS), or "unclassifiable" (area's attainment status cannot be determined based on available information). CAA §107(d)(1)(A)(i)-(iii), 42 U.S.C. §7407(d)(1)(A)(i)-(iii). An area may be "attainment" for some pollutants and "nonattainment" for others.

Section 107(d) provides that areas may be or have been designated in three different circumstances. First, areas may be designated when a new NAAQS is established or an existing one is revised. CAA § 107(d)(1); 42 U.S.C. § 7407(d)(1). Second, areas were designated following the 1990 Amendments to the Clean Air Act. CAA § 107(d)(4); 42 U.S.C. § 7407(d)(4). Third, areas may be "redesignated" based on new information, CAA § 107(d)(3); 42 U.S.C. § 7407(d)(3); for example, an attainment area may be redesignated as nonattainment if its air quality ceases to meet the NAAQS.

State Implementation Plans. The next step is for the states to submit state implementation plans, or "SIPs." CAA § 110, 42 U.S.C. § 7410. These plans specify the measures states will take to attain or maintain the NAAQS within their borders. 42 U.S.C. § 7410(a)(1). A state may consider cost and technological feasibility in developing its SIP; indeed, "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires . . ." *Union Electric*

Company v. EPA, 427 U.S. 246, 266 (1976); *see also Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

Nonattainment. Special rules apply to nonattainment areas. Part D of Subtitle I of the Act sets forth requirements for SIPs in states containing nonattainment areas. CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. Part D contains five subparts. Subpart 1 sets forth rules for nonattainment areas in general. CAA §§171-179B, 42 U.S.C. §§ 7501-7509a. Subparts 2-5, added to the Act in 1990, impose new requirements on areas that had not attained the various NAAQS existing at that time. CAA § 181-192, 42 U.S.C. §§ 7511-7514a.

Subpart 1. Under Subpart 1, the Administrator may "classify" nonattainment areas in accordance with the severity of their air quality problems, for the purpose of setting attainment deadlines. CAA § 172(a)(1)(A), 42 U.S.C. §7502(a)(1)(A). Subpart 1 requires that SIPs in nonattainment areas achieve "reasonable further progress" toward attaining the NAAQS. Subpart 1 also requires that primary NAAQS be achieved "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . . ." CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A).

Subpart 2. Subpart 2 imposed new, more specific requirements on areas that had not attained the ozone standard existing in 1990, when Subpart 2 was enacted.[5] Like Subpart 1, Subpart 2 establishes both what is required in these nonattainment areas and when it is required. Specific requirements and deadlines depend on an area's classification, and the classification depends on the severity of an area's air pollution problem. The classifications prescribed by Subpart 2 are keyed to the ozone standard existing in 1990, as is the methodology to be employed in making these classifications. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). Most of the deadlines

[5]Subparts 3-5 imposed new requirements on areas that did not meet the existing standards for carbon monoxide, particulate matter, nitrogen dioxide, and/or lead. CAA §§ 186-193, 42 U.S.C. §§ 7512-7515.

contained in Subpart 2 have already passed. *See, e.g.*, CAA § 181(a)(1); 42 U.S.C. § 7511(a)(1) (table 1).

3. History of the Clean Air Act and the NAAQS Program

This regulatory regime did not emerge overnight. In fact, the Clean Air Act today embodies no fewer than eleven separate Acts of Congress, stretching back almost 50 years.[6] These five decades of federal air pollution law have witnessed an extraordinary collaboration between Congress and the agencies that have been charged with implementing Congress's commands. In the historical development of the Clean Air Act, one can observe a decades-long dialogue between Congress and the executive about the scope and content of federal air pollution policy. This collaboration and dialogue has led to numerous extremely precise and significant refinements in the statutory language relating to air quality criteria and standards, refinements that reflect the congressional response to the executive's experiences in grappling with the problem of air pollution.

Congress's effort to address the problem of air pollution began in 1955. The first federal law on air pollution authorized the Surgeon General to conduct studies on the consequences and prevention of air pollution and provided funding for this research.[7] Reflecting Congress's conviction at the time that air pollution was a matter for states and local governments to address, a primary purpose of the research was to help these entities attack air pollution problems on their own.[8] To this day, a primary aim of the Clean Air Act is to promote research into the causes and consequences of air pollution; indeed, vestiges of the 1955 statute can be found in

[6]*See* 1 William H. Rodgers, *Environmental Law* 124 (2d ed. 1994).

[7]*See* Air Pollution Control Act of 1955, Pub. L. 84-159, 69 Stat. 322.

[8]*See id.*

today's Clean Air Act.[9]

The early federal legislation reflected the growing awareness that air pollution posed a severe threat to the population's health and welfare. Severe air pollution episodes in Donora, Pennsylvania, in 1948, in London in 1952, and in New York City in 1953 had together caused the deaths of thousands of people.[10] A study of the Donora episode performed by the United States Public Health Service provided the first definitive evidence of the acute health effects of air pollution.[11] Studies performed in the 1950s also began to establish a causal link between automotive exhausts and smog.[12] In 1960, Congress responded to these early findings by passing the Schenck Act, calling for further research into the consequences for health and welfare of motor vehicle exhaust.[13] Thus the early years of federal air pollution legislation witnessed a consistent pattern: preliminary research showed a threat from air pollution; this research was followed by critiques and counter-research; and the eventual result was typically research confirming the existence of a threat. This pattern – the pattern, in fact, of scientific inquiry – is a recurring, indeed defining, feature of air pollution control.

The 1960s witnessed the federal government's steadily increasing involvement in addressing air pollution. In 1963,

---

[9]*Compare, e.g.*, § 3, 69 Stat. 322, *with* CAA § 103(a)(3), 42 U.S.C. § 7403(a)(3) (authorizing Surgeon General and EPA, respectively, to conduct research and make recommendations at the request of state and local agencies).

[10]*See* Staff of Senate Comm. on Public Works, 88th Cong., 1st Sess., *A Study of Pollution – Air* 13 (Comm. Print 1963).

[11]*See* H.H. Schrenk, U.S. Public Health Service, Air Pollution in Donora, Pa. (1949).

[12]*See Air Pollution Problems: Hearings Before the House Select Comm. on Small Business*, 84th Cong., 2d Sess. 42 (1956) (statement of Arie J. Haagen-Smit, Cal. Inst. of Tech.).

[13]*See* Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162 (1960).

Congress enacted the original Clean Air Act.[14] This statute for the first time authorized the federal government–acting through the Secretary of the Department of Health, Education, and Welfare (HEW)–to establish "criteria" for air quality. 77 Stat. 392 § 3(c)(2). The language describing the scope and content of the original air quality criteria was strikingly similar to the corresponding language of the Clean Air Act today.[15]

The Clean Air Act of 1963 also directed the Secretary to gather and publish information on air pollution control techniques.[16] The criteria and the information on control techniques were to be made available to state, local, and interstate air pollution control agencies,[17] and the Secretary was directed to help these agencies develop their own standards to control air pollution.[18] Somewhat confusingly, Congress used the same term, "criteria," for both the scientific *information* on the consequences of air pollution and *standards* for air quality.[19] But the basic goal of the standards was clear enough and has persisted to this day: the Secretary was to recommend to local, state, or interstate air pollution control agencies those standards which "in [the Secretary's] judgment

---

[14]*See* Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

[15]The statute provided:

> Whenever [the Secretary] determines that there is a particular air pollution agent (or combination of agents), present in the air in certain quantities, producing effects harmful to the health or welfare of persons, the Secretary shall compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollutant agent (or combination of agents) in the air in varying quantities.

§ (3)(c)(2), 77 Stat. 392; *cf.* CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2).

[16]*See* §§ 3(a)(1), 3(b)(8), 77 Stat. at 394-95.

[17]*See* § 3(c)(2), 77 Stat. at 395.

[18]*See* §§ 2(a), 3(a)(2), 3(b), 77 Stat. at 393-95.

[19]*See* § 3(c)(3), 77 Stat. at 395.

may be necessary to protect the public health and welfare."[20]

The Clean Air Act of 1963 thus introduced some of the broad outlines of federal air pollution policy as it exists today. However, the statute did not set deadlines for HEW's establishment of air quality criteria; it encouraged but did not require the establishment of air quality standards by states and local governments; and it provided new but cumbersome and limited mechanisms for the control of interstate air pollution.[21] Thus, it is not surprising that little happened under the Clean Air Act of 1963: HEW published air quality criteria for only one set of air pollutants, sulfur oxides,[22] and the enforcement mechanisms created by the Act proved inadequate.[23]

In 1967, Congress acted again.[24] In the Air Quality Act of 1967, Congress directed the Secretary of HEW to establish air quality criteria that were to reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities."[25] In developing the criteria, the Secretary was directed to consult with "appropriate advisory committees and

---

[20] § 3(c)(3), 77 Stat. at 395.

[21] §§ 3(c)(2)-(3), 5, 77 Stat. at 395-99.

[22] *See* Public Health Service, HEW, Pub. No. 1619, Air Quality Criteria for Sulfur Oxides (1967) [hereinafter 1967 SOx Criteria Doc.].

[23] *See* Rodgers, *supra*, at 130.

[24] Congress also had, two years before, passed amendments to the Clean Air Act which, for the first time, directed the Secretary to set emissions standards for motor vehicles. *See* Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, § 202, 79 Stat. 992.

[25] Air Quality Act of 1967, Pub. L. No. 90-148, § 107(b)(2), 81 Stat. 491. The 1967 Act also continued to require the Secretary to develop and disseminate information on control techniques. For the first time, Congress required that this information include information on technological and economic feasibility. *See* § 107(c), 81 Stat. at 491.

Federal departments and agencies."[26] In light of this new requirement, the Secretary was told to reevaluate the only criteria document he had issued so far (on sulfur oxides).[27]

The 1967 Act also introduced part of the language that now governs the NAAQS themselves: the Act directed the Secretary to issue "such criteria of air quality as in his judgment may be requisite for the protection of the public health and welfare."[28]

Congress continued to rely largely on the states for the development of air quality *standards* (rules governing air quality) as opposed to *criteria* (the scientific documents on which the standards were to depend). But in the 1967 Act, Congress created an important exception to this rule: if a state did not establish air quality standards for air pollutants for which the Secretary had issued criteria or if a state established standards which were not "consistent with" the Secretary's criteria, the Secretary himself was required to promulgate air quality standards for that state.[29]

Once again, however, the statute did not obligate HEW to act by a certain date, nor did it obligate the states to act at all. And, once again, progress under the statute was disappointing. By late 1969, HEW had issued criteria for only two pollutants;[30] fewer than half of the states had set air quality standards for sulfur oxides;[31] and no state air quality

---

[26] § 107(b)(1), 81 Stat. at 491.

[27] *See id.*

[28] *Id.*

[29] §§ 108(c)(1-2), 81 Stat. at 492.

[30] *See* 1967 SOx Criteria Doc.; National Air Pollution Control Administration (NAPCA), HEW, Pub. No. AP-49, Air Quality Criteria for Particulate Matter (1969) [hereinafter 1969 PM Criteria Doc.]; NAPCA, HEW, Pub. No. AP-50, Air Quality Criteria for Sulfur Oxides (1969) [hereinafter 1969 SOx Criteria Doc.].

[31] *See* Secretary of Health, Education, and Welfare, Progress in the Prevention and Control of Air Pollution, S. Doc. No. 91-64, at 16-18 (2d. Sess. 197[illegible] *see*

standard had been approved by HEW.[32] In addition, the enforcement mechanisms of the 1967 Act, aimed at interstate air pollution, lay almost entirely dormant.[33] By the time HEW issued criteria for three more air pollutants in early 1970, Congress was already at work on new legislation.[34]

The Clean Air Amendments of 1970 reflected a fundamental break with the past in several respects. The most obvious change was institutional: for the first time, Congress required the federal government to set standards for air quality even in the absence of a finding of inadequacy with respect to any state standards. The states retained the task of implementing the air quality standards, but EPA–created during Congress's deliberations on the 1970 Amendments[35]–was directed to set the standards.[36]

Also for the first time, Congress limited the category of air pollutants to which the air quality standards would apply. The 1970 Amendments provided that the standards would be set only for pollutants listed by EPA, and that EPA would list a pollutant only if it "has an adverse effect on public health or

---

also Air Pollution - 1970: Hearings Before the Subcomm.. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (March 17, 1970) (Appendix - Part 1) (hereinafter "March 17 Hearing")

[32]*See* March 17 Hearing, *supra* (Appendix - Part 1).

[33]*See* S. Doc. No. 91-64, at 24-25; *see also* March 17 Hearing, *supra* (Appendix - Part 1).

[34]*See* NAPCA, HEW, Pub. No. AP-62, Air Quality Criteria for Carbon Monoxide (1970) [hereinafter 1970 CO Criteria Doc.]; NAPCA, HEW, Pub. No. AP-63, Air Quality Criteria for Photochemical Oxidants (1970) [hereinafter 1970 Ozone Criteria Doc.]; NAPCA, HEW, Pub. No. AP-64, Air Quality Criteria for Hydrocarbons (1970) [hereinafter 1970 HC Criteria Doc.].

[35]*See* Reorg. Plan No. 3 of 1970, 5 U.S.C.A. App. (Supp. 1992).

[36]*See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 109, § 4(a), 84 Stat. 1679. States are free, however, to set air quality standards that are stricter than the federal standards. CAA § 116, 42 U.S.C. § 7416.

welfare" and comes from "numerous or diverse" sources.[37]

With respect to the air quality *criteria*, Congress required for the first time that the criteria describe effects on "*public* health and welfare." Previously, it had required that criteria describe effects on the health and welfare "of persons"[38] or simply on "health and welfare."[39] Indeed, the original Senate version of the 1970 amendments referred to the "health of persons," but the House version–referring to "public health or welfare"–prevailed.[40] Tellingly, at the same time, Congress endorsed the same shift in emphasis with respect to mobile source emission standards: whereas, in 1965, Congress had called for mobile source emissions standards whenever air pollutants endangered the "health or welfare of any persons," in 1970, Congress required such standards only when the "*public* health or welfare" was at risk.[41] By targeting public health, Congress instructed EPA to target health effects in *populations* rather than in single individuals.[42]

Congress also made two significant adjustments to the substance of the air quality *standards*. Although Congress had

---

[37]Sec. 108(a)(1)(A-B), § 4(a), 84 Stat. at 1678.

[38]Clean Air Act of 1963, Pub. L. No. 88-206, § 3(c)(2), 77 Stat. 392, 395.

[39]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 107(b)(1), §2, 81 Stat.491.

[40]*Compare* H.R. 17255, 91st Cong. § 2(a) (1970) (requiring air quality standards to be set for pollutants that "endanger or may endanger the public health or welfare") *with* H.R. 17255, 91st Cong. § 10(a)(3) (1970) (providing that air quality standards are those the attainment and maintenance of which are "necessary to protect the health of persons").

[41]*Compare* Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, sec. 202(a), §6, 79 Stat. 992, *with* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 202 (a)(1), §6, 84 Stat. 1690.

[42]The Senate Report stated that NAAQS must "protect the health of any group of the population," including sensitive groups for which "reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in the group." S. Rep. No. 91-1196, at 10 (2d Sess. 1970).

previously directed HEW to encourage states and local governments to set uniform standards,[43] it had never required uniformity. This changed in 1970: Congress required EPA's new air quality standards to be *nationally uniform*.[44]

The 1970 Amendments also stated for the first time that the air quality standards protecting human health–the primary standards[45]–must embody "an adequate margin of safety."[46] The requirement of a margin of safety followed directly from HEW's experience in developing its first criteria documents.

HEW's research regarding the first criteria pollutants had revealed several important features (and limits) of scientific inquiry into the effects of air pollution on human health and welfare. First of all, HEW's review of the scientific literature on the criteria pollutants had revealed a diverse array of harms which occurred at a diverse array of pollution levels.[47] The effects on human health alone, HEW had discovered, varied widely, including such disparate effects as the initiation and/or aggravation of respiratory diseases including bronchitis[48] and asthma,[49] impairment of the oxygen-carrying

---

[43]*See* Clean Air Act of 1963, Pub. L. No. 88-206, § 2(a), 77 Stat. 393.

[44]*See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 109(a)(1), § 4(a), 84 Stat. 1679 (directing Administrator to publish "a" primary NAAQS and "a" secondary NAAQS for each criteria pollutant).

[45]The creation of two categories of standards – primary and secondary – was another innovation of the 1970 Amendments. *See* sec. 109, § 4(a), 84 Stat. at 1679-80.

[46]Sec. 109(b)(1), § 4(a), 84 Stat. at 1679.

[47]*See* 1967 SOx Criteria Doc. liii (graphic depiction of results of studies concerning health and welfare effects sulfur oxides); 1969 PM Criteria Doc., *supra*, at 188-89 (summary of health effects at various exposure levels); 1970 CO Criteria Doc., *supra*, at 10-7 (table reflecting health effects at various exposure levels); 1970 Ozone Criteria Doc., *supra*, at 10-9 to 10-13 (text and table detailing health and welfare effects associated with different levels of exposure).

[48]EPA, Air Quality Criteria for Nitrogen Oxides 11-8 (1971) [hereinafter 1971 NOx Criteria Doc.].

capacity of the blood,[50] and premature death.[51]

Second, HEW's research had revealed no bright line pollutant level above which adverse effects on human health and welfare were certain to occur and below which such effects did not occur. Identifying a bright line above which adverse effects would certainly occur proved difficult because much of the research on air pollution studied the effects of pollutants in combination rather than in isolation; thus, in developing the criteria for sulfur oxides, for example, HEW acknowledged the possibility that the health effects it found were due to the combination of sulfur oxides and other pollutants rather than to sulfur oxides alone.[52] Inconsistencies among scientific studies,[53] and shortcomings in the studies' methodologies,[54] created further difficulties.[55]

At the same time, HEW had little confidence that the lowest levels at which adverse effects had been detected in the scientific literature were in fact the lowest levels at which such effects occurred.[56] Equally important, HEW had discovered

---

[49]*See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[50]*See* 1970 CO Criteria Doc., *supra*, at 10-3.

[51]*See* 1967 SOx Criteria Doc., *supra*, at xxix.

[52]*Id.* at v-vi.

[53]*See* 1970 Ozone Criteria Doc., *supra*, at 10-7 to 10-8.

[54]1969 PM Criteria Doc., *supra*, at 183 (failure to control for smoking habits).

[55]HEW also encountered challenges simply in measuring exposure levels. *See, e.g.*, 1970 Ozone Criteria Doc., *supra*, at 10-1 to 10-2.

[56]In its 1969 guidelines on developing air quality criteria, HEW explained:

> The exposure levels which have thus far been associated with identifiable effects . . . are not necessarily the lowest levels of exposure that will produce such effects. Nor are those effects necessarily the only ones produced by such exposures. Knowledge of the synergistic effects of air pollutants is limited. So is knowledge of possible long-term genetic

that part of the reason why it was difficult or impossible to identify a single "safe" level of pollution was that different people responded differently to air pollution. HEW's research had revealed that certain subpopulations–including the elderly[57] and people with preexisting cardiovascular or respiratory disease[58]–were most susceptible to the adverse effects of air pollution.[59] In the first criteria document on particulate matter, HEW observed that many effects on sensitive subpopulations would not be picked up by epidemiological research because the sample sizes were often too small.[60]

HEW responded to these challenges by endorsing an approach to standard-setting that leaned in favor of more rather than less stringent standards. In every criteria document published after 1967,[61] HEW closed with a

---

effects. . . . In short, air quality criteria cannot be interpreted as threshold values; indeed, for many types of air pollutants, there may not be a threshold of risk to health and the environment. In the evaluation of biological effects of environmental contaminants, whether in the community or occupational environment, accumulating evidence has almost invariably shown that adverse effects can and do occur at exposure levels that at one time were considered "safe."

NAPCA, HEW, Guidelines for the Development of Air Quality Standards and Implementation Plans 16 (1969).

[57] *See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[58] *See* 1967 SOx Criteria Doc., *supra*, at xxviii; 1969 PM Criteria Doc., *supra*, at 188 (aggravation of bronchitis); 1970 Ozone Criteria Doc., *supra*, at 10-7 (aggravation of asthma); 1970 CO Criteria Doc., *supra*, at 10-4

[59] Congress also had reason to believe that children comprised a subpopulation that might be especially sensitive to air pollution. In his floor statement introducing the 1970 Amendments, Senator Muskie referred to a study concerning the health effects of nitrogen dioxide on children. 116 Cong. Rec. 32,913 (1970).

[60] *See* 1969 PM Criteria Doc., *supra*, at 188.

[61] The hydrocarbons criteria document did not offer this recommendation because HEW found that hydrocarbons cause no direct health effects by

recommendation to the following effect:

> It is reasonable and prudent to conclude that, when promulgating ambient air quality standards, consideration should be given to requirements for margins of safety which take into account long-term effects on health and materials occurring below the above levels.[62]

This recommendation was directed at the local, state, and interstate agencies which were, at that time, responsible for setting air quality standards.[63]

The 1970 Amendments dealt with the challenges HEW had encountered in two ways. First, as noted, the Amendments required for the first time a "margin of safety" in air quality standards, thus accepting the recommendation HEW had made in its criteria documents.[64]

Second, Congress endorsed the criteria documents HEW had so far compiled. Congress did not require HEW to reevaluate any existing criteria, as it had done in 1967 with

---

themselves; they cause adverse effects only by interacting with other pollutants to form ozone. 1970 HC Criteria Doc., *supra*, at 8-5.

[62] 1969 PM Criteria Doc., *supra*, at 189; *see also* 1970 Ozone Criteria Doc., *supra*, at 10-13; 1970 CO Criteria Doc., *supra*, at 10-6; 1971 NO Criteria Doc., *supra*, at 11-12.

[63] Congress was well aware of HEW's practice of recommending margins of safety for air quality standards. In a Senate hearing during the crafting of the 1970 amendments, the head of the HEW unit responsible for developing air quality criteria and standards noted HEW's practice of including a margin of safety in its recommendations, claiming that the margin of safety corrected for the fact that "the no-effect level always corresponds . . . to the limitations of scientific knowledge in this area." *Air Pollution – 1970: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (May 27, 1970) (statement of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration, HEW).

[64] The Senate report on the legislation explained that "margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified." S. Rep. No. 91-1196, at 10.

respect to the sulfur oxides criteria. Moreover, not only did Congress require air quality standards to be "based on" the criteria rather than merely "consistent with" them,[65] it also required EPA to *base the very first NAAQS on HEW's existing criteria.*[66] These facts signal a congressional endorsement of HEW's basic approach in the criteria documents compiled as of 1970–an approach which featured inquiry only into the consequences for health and welfare of pollutants in the ambient air; close attention to the effects of air pollution on sensitive segments of the population;[67] and knowing recognition of the difficulties of drawing a bright line between pollution that is harmful and pollution that is not.

Congress substantially revised the Clean Air Act again in 1977, making three important adjustments to the NAAQS-setting process. First, Congress added the requirement that the criteria and the NAAQS be reviewed and, if appropriate, revised, every five years.[68] Second, Congress required EPA to create and to consult with CASAC.[69] Finally, Congress altered the requirements for determining which pollutants were

---

[65]*Compare* Air Quality Act of 1967, Pub. L. No. 90-148, sec. 108(c)(1), § 2, 81 Stat. 491, *with* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 109(b)(1), § 4(a), 84 Stat. 1680.

[66]*See* CAA §109(a)(1)(A), 42 U.S.C. §7409(a)(1)(A) (requiring EPA Administrator to issue, within 30 days from the enactment of the 1970 amendments, primary and secondary NAAQS "for each air pollutant for which air quality criteria have been issued prior to such date").

[67]The 1970 Senate Report emphasized that "[c]oncern for health effects must extend beyond "normal" segments of the population to effects on the very young, the aged, the infirm, and other susceptible individuals." S. Rep. No. 91-1196, at 7. More specifically, the Report stressed that NAAQS were to protect the health of sensitive subpopulations such as bronchial asthmatics and emphysematics. *Id.* at 10.

[68]*See* Clean Air Act Amendments of 1977, Pub. L. 95-95, sec. 109(d)(1), §106(a), 91 Stat. at 691.

[69]*See* sec. 109(d)(2), § 106(a), 91 Stat. at 691.

subject to the NAAQS program: whereas in 1970 Congress had specified that the program applied to a pollutant if it "*has* an adverse effect on public health or welfare,"[70] in 1977 it provided that the program applied to a pollutant if it "*may reasonably be anticipated* to endanger public health or welfare."[71] This amendment followed directly from EPA's experience in regulating airborne lead.[72]

In sum, an extraordinary pattern of dialogue and collaboration between Congress and the executive has characterized the history of federal air pollution control. In ways large and small, Congress has continually adjusted EPA's course in implementing the Clean Air Act. Congress has even passed legislation in response to the very standards at issue in this case.[73]

---

[70]Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 108, § 4(a), 84 Stat. 1678 (emphasis added).

[71]Clean Air Act Amendments of 1977, Pub. L. 95-95, sec. 108(a)(1)(A), §401(a), 91 Stat. at 791 (emphasis added).

[72]The House Report accompanying the 1977 amendments explained that the inclusion of the "may reasonably be anticipated" language was a direct response to *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976) (upholding EPA' regulation of lead in gasoline), and was meant "to emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs" and "to reflect awareness of the uncertainties and limitations in the data which will be available to the Administrator in the foreseeable future to enable him to execute his duties under this act." H.R. Rep. No. 95-294, at 43-53 (1st Sess. 1977).

[73]*See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §§ 6101-04, 112 Stat. 463-65 (1998). This legislation adjusted the deadlines for designating areas pursuant to the revised NAAQS, although it did not alter the standards themselves. §§ 6102(c)(1), 6102(d), 112 Stat. at 464-65 (adjusting deadlines for designations under new PM NAAQS); § 6103 , 112 Stat. at 465 (adjusting deadlines for designations under ozone NAAQS); § 6104, 112 Stat. at 465 (stating that statute should not be construed to affect pending litigation or to ratify revised standards).

B. Rulemakings on Particulate Matter and Ozone

1. Particulate Matter

Particulate matter (PM) refers to a broad class of diverse substances that exist as discrete particles–in solid or liquid form–over a wide range of sizes. Particles originate from a variety of stationary and mobile sources as well as from natural sources. They may be either emitted directly or formed in the atmosphere through transformations of pollutants such as sulfur oxides, nitrogen oxides, and volatile organic compounds. The chemical and physical characteristics of PM vary substantially with time, region, meteorology, and source category. *See* NAAQS for PM, 62 Fed. Reg. at 38,652-53.

EPA first promulgated a NAAQS for PM in 1971. 36 Fed. Reg. 8186. In July 1987, in response to a revised criteria document, EPA changed the size of the particulates regulated by the NAAQS to include only particulates with an aerodynamic diameter of less than or equal to a nominal ten microns (PM_{10}). 52 Fed. Reg. 24,854 (1987).

In April 1994, EPA announced its intention to develop revised air quality criteria for PM. The focus of the review was recent epidemiological evidence reporting associations between ambient concentrations of PM and a range of serious health effects, including effects caused by particulates far smaller than ten microns. During the next two years, the agency held several workshops, provided opportunities for public comment on a draft criteria document, and sponsored CASAC review of the document at public meetings.

On November 27, 1996, EPA announced its proposed decision to revise the PM NAAQS. 61 Fed. Reg. 65,638. EPA proposed adding two new PM NAAQS that addressed particulates with an aerodynamic diameter less than or equal to a nominal 2.5 microns ($PM_{2.5}$). The Administrator described several alternatives for the level, averaging time, and form of the revised PM standards, including possible changes in the

then-existing PM_{10} NAAQS. *Id.* at 65,662.

On July 18, 1997, EPA announced final revisions to its PM NAAQS. 62 Fed. Reg. 38,652. The Administrator determined that it was appropriate to establish new annual and 24-hour NAAQS for $PM_{2.5}$ and to revise the current 24-hour PM_{10} standard.[74] The Administrator noted that that the agency had undertaken an especially rigorous review and reanalysis of existing scientific data and that recent studies provided "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban airsheds even at concentrations below current U.S. PM standard." *Id.* at 38,655. The Administrator further described the results of risk assessments for two cities that, while accompanied by significant scientific uncertainty, "found that the risk remaining after attaining the current PM_{10} standards was on the order of hundreds of premature deaths each year, hundreds to thousands of respiratory-related hospital admissions, and tens of thousands of additional respiratory related symptoms in children." *Id.* at 38,656.

2. Ozone

Photochemical oxidants are formed as a result of chemical reactions of volatile organic compounds, nitrogen oxides, and oxygen in the presence of sunlight. Ozone is the photochemical oxidant that exists in greatest volume and is

---

[74]For $PM_{2.5}$, EPA set a annual standard of 15 micrograms per cubic meter ($\mu g/m^3$) with compliance measured based on the three-year average of the annual arithmetic mean $PM_{2.5}$ concentrations from single or multiple community-oriented monitors, and also set a 24-hour standard of 65 $\mu g/m^3$ based on the three-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area. EPA changed only the form of the PM_{10} standard. NAAQS for PM, 62 Fed. Reg. at 38,652.

regulated as the surrogate for photochemical oxidants.[75] The control of ozone depends on the control of its precursors, volatile organic compounds and nitrogen oxides.

EPA first issued a NAAQS for photochemical oxidants in 1971. 36 Fed. Reg. 8186. The original standard specified a maximum level of 0.08 ppm, averaged over one hour, with one exceedance allowed per year. 36 Fed. Reg. at 8187. That standard was revised in 1979 by increasing the allowable level to 0.12 ppm and changing the form of the standard. 44 Fed. Reg. 8202 (1979).

The EPA initiated a review of the air quality criteria and standards for ozone in August 1992. In an iterative process involving EPA staff, CASAC, and the public, EPA developed a criteria document and staff paper on the health and welfare effects of ozone. The CASAC panel concluded that the one-hour standard should be replaced with an eight-hour standard; the level of the standard should be within the range of 0.07 to 0.09 ppm; and the form of the standard should be changed to allow two to five exceedances. Letter from George T. Wolff, CASAC Chair, to Carol Browner, EPA Administrator, regarding CASAC closure on EPA's staff paper for the primary ozone standard(Nov. 30, 1995) <www.epa.gov/science1/casac02.pdf>.

On November 27, 1996, EPA proposed to revise the NAAQS for ozone. 61 Fed. Reg. 65,716. EPA proposed to replace the one-hour, 0.12 ppm primary standard with an eight-hour, 0.08 ppm standard, and to establish a new form for measuring compliance with the standard. The proposal solicited comments on alternative standards reflecting different levels, averaging times, and forms. *Id.* at 65,731, 65,733.

On July 18, 1997, EPA announced final revisions to its ozone NAAQS. 62 Fed. Reg. 38,856 (1997). The final rule set a level of 0.08 ppm, with an averaging time of eight hours and a form based on the 3-year average of the annual fourth-highest daily

[75]NAAQS for Photochemical Oxidants, 44 Fed. Reg. 8202 (1979).

maximum 8-hour average ozone concentrations measured at each monitor within an area. *Id.* at 38,873.[76]

In revising the ozone standard, the Administrator invoked a large body of scientific evidence consisting of clinical, epidemiological, and animal studies revealing the adverse effects of ozone at levels allowed by the previous standard. 62 Fed. Reg. at 38,863-65. She cited "clear evidence from human clinical studies" showing that the adverse effects from exposure to ozone include "lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation." *Id.* at 38,863. The Administrator also relied on the numerous epidemiological studies drawing a link between ozone exposures and excess hospital admissions and emergency room visits. *Id.* at 38,864.

In setting the parameters for the revised ozone standard, the Administrator noted that CASAC had unanimously endorsed an eight-hour averaging period and that all CASAC members who had expressed specific opinions on the form of the standard had favored a concentration-based form allowing multiple exceedances. 62 Fed. Reg. at 38,861, 38,869. As for the level of the standard, the Administrator considered alternatives only within the range endorsed by CASAC (0.07 to 0.09 ppm). She acknowledged that no one correct policy response emerged from the scientific evidence. *Id.* at 38,863. In choosing between levels of 0.09, 0.08, and 0.07, however, the Administrator emphasized that no member of CASAC had endorsed the 0.07 level and stressed that severity of effects decreased, and uncertainty increased, at levels below 0.08 ppm. *Id.* at 38,854, 38,868. In rejecting the 0.09 ppm level, the Administrator emphasized that such a standard would result

[76]The original standard for ozone, set in 1971, also had a level of .08 ppm – but this was averaged over one rather than eight hours, and fewer exceedances were permitted on average per year, 36 Fed. Reg. at 8187, thus apparently making today's ozone standard more lenient than the original standard promulgated almost 30 years ago.

in many more adverse health effects, particularly among children, than would the 0.08 ppm level. *Id.* at 38,867-68.[77]

C. The Court of Appeals' Decision

Numerous parties filed petitions for review of EPA's revised standards in the D.C. Circuit. The D.C. Circuit found that EPA's application of the Clean Air Act in these rulemakings effected a "delegation of legislative power" in violation of Article I, § 1, of the Constitution. State Petitioners' Appendix to Petition for Certiorari at 3 (State Pet. App.). The court explained that "EPA appears to have articulated no 'intelligible principle' to channel its application of the[] factors [it uses in setting NAAQS]; nor is one apparent from the statute." State Pet. App. 4.

The court came to this conclusion based not on a review of the Clean Air Act itself but on a review of EPA's 1997 rulemakings on PM and ozone. The court found the agency's explanations for its rules constitutionally deficient because they did not identify a "stopping point" for regulation. State Pet. App. 10. Although the court agreed that the factors EPA considers in setting the NAAQS–such as the nature and severity of health effects, the size of the affected population, and the kind of health information available and the uncertainties surrounding it–were reasonable, it concluded that these factors "do not themselves speak to the issue of degree." State Pet. App. 6. The court also dismissed as irrelevant the exhaustive scientific review underlying EPA's

---

[77]In both rulemakings, EPA went to extraordinary lengths to facilitate public participation: the agency established a toll-free telephone hotline; set up a system enabling electronic comments via the Internet; held multiple public meetings at which over 400 citizens and organizations testified; fielded over 14,000 phone calls and over 4,000 electronic mail messages; and held two national satellite telecasts to answer questions. EPA also received over 50,000 written and verbal comments. *See* 62 Fed. Reg. at 38,656; 62 Fed. Reg. at 38,858.

standards. *See* State Pet. App. 8.

The court remanded the case to EPA. The court acknowledged that allowing EPA to correct the constitutional defect the court had discerned in the statute would not satisfy what it called a "key function of non-delegation doctrine," which is to ensure that Congress, not the agency, exercises legislative authority. State Pet. App. 12-13. Indeed, the court conceded that, under its approach, "[t]he agency will make the fundamental policy choices." State Pet. App. 13.

The court hinted at the kinds of standards that might pass constitutional muster. The court acknowledged that its first proposal–cost-benefit analysis–was not open to EPA given the court's precedents interpreting the Clean Air Act to forbid EPA to consider costs in setting the NAAQS. *See* State Pet. App. 13. Alternatively, the court proposed that EPA develop a "generic unit of harm that takes into account population affected, severity and probability." More specifically, the court endorsed setting environmental standards according to their effect on "quality-adjusted life-years," State Pet. App. 15, although it conceded that the Department of Health and Human Services had determined that a similar approach utilized by Oregon in the health-care context violated the Americans with Disabilities Act. State Pet. App. 15 n. 5.

The court also addressed claims that EPA could neither issue nor enforce a revised ozone standard. The court found that EPA could indeed issue a revised ozone standard, and also designate areas as nonattainment under the revised standard. *See* State Pet. App. 31-34. However, the court concluded that EPA could not enforce a revised ozone standard "other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." State Pet. App. 31.

The court reasoned that because section 181(a)(1) of Subpart 2 refers to nonattainment designations made under "section 7407(d)," the classifications and attainment dates specified in Subpart 2 apply to areas designated as nonattainment under

any of the provisions of section 107(d). State Pet. App. 34-35. Thus, areas designated nonattainment under section 107(d)(1), following the revision of a NAAQS, would be governed by Subpart 2. Having found the statute clear, the court refused to defer to EPA's interpretation, which would have allowed enforcement of the revised standard outside of Subpart 2. State Pet. App. 37-39.

The court granted partial rehearing and modified its opinion to state that EPA could enforce the revised ozone standard "only in conformity with Subpart 2." State Pet. App. 75. Although he had dissented from the original panel decision, Judge Tatel concurred in this aspect of the decision on rehearing because he believed that the modified opinion left open "the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates." State Pet. App. 76. He concluded that EPA may enforce the revised ozone standard in areas that have attained the prior, one-hour standard, but not in areas that have not yet attained that standard. State Pet. App. 81.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the Clean Air Act, and EPA's longstanding interpretation of it, violate the nondelegation doctrine.

a. The Clean Air Act places significant constraints on EPA's discretion in setting the NAAQS. The Act prescribes the factors EPA may and may not consider in setting the NAAQS; requires a margin of safety in the NAAQS as an antidote to scientific uncertainty; limits the range of pollutants regulated by the NAAQS program; limits the life span of each NAAQS; and imposes significant procedural constraints on EPA's decisionmaking, including a scientific review process as intensive as any on the statute books. In truth, the Clean Air Act's manifold constraints on EPA's discretion make the statute look like a veritable straitjacket compared to the

assignments of authority from Congress to the executive that this Court has long upheld.

b. The history of the NAAQS program shows Congress's deep involvement in the development of the program. Congress has not only made all of the most basic and important decisions that arise in setting air quality standards, it has also done so by attending to the executive's experience in setting such standards. Congress has responded to the kinds of challenges that arise in setting environmental standards in the face of persistent scientific uncertainty not by foisting ever more responsibility onto an executive agency, but by tackling the basic issues itself. Far from abdicating its legislative role in this setting, Congress has embraced it.

c. The court below erred in (implicitly) fashioning a new requirement under the nondelegation doctrine–one that demands that guidance for administrative action come in quantitative form. This Court's decisions have squarely rejected such a requirement. Moreover, air pollution control would be an exceedingly inappropriate context in which to create such a requirement. The air pollutants regulated by the NAAQS program cause a diverse array of adverse effects on human health and welfare through a wide range of causal mechanisms. The uncertainties that surround predictions of these effects also come in a wide variety of shapes and sizes. Requiring a quantitative meta-standard to govern the setting of air quality standards would effectively shut down the federal program of air pollution control and turn the nondelegation doctrine into an agent of regulatory paralysis.

2. Respondents Massachusetts and New Jersey anticipate that the Solicitor General's brief for the federal government will adequately treat the second issue on which this Court has granted review, involving the finality and ripeness of the court of appeals' decision on the scope of EPA's authority to implement the revised ozone standard. Thus we will not discuss this issue in our brief.

3. The court of appeals erred in finding that EPA may not

enforce the revised ozone standard "other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." Under the court's ruling, EPA may find the prior one-hour ozone standard to be insufficient to protect the public health and thus may revise that standard, but upon revising it, it is limited to the enforcement regime set forth in Subpart 2–which features, for example, many deadlines that passed long ago. Nowhere does the Clean Air Act suggest, let alone compel, a finding that Congress intended such an absurd result. On the contrary, careful review of the language, history, and purpose of Subpart 2 clearly shows that it applies only to the ozone standard existing in 1990.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION.

Because it found no numerical "cut-off point" for national air quality standards in either the Clean Air Act itself or EPA's interpretation of it, the court of appeals held that neither the statute nor EPA's interpretation provides the "intelligible principle" that this Court has required of assignments of authority from Congress to the executive. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). In so holding, the court revealed a deep misunderstanding of this Court's nondelegation doctrine.

This Court has never required that congressional assignments of authority to the executive take a particular *form*, be it numerical or otherwise. Instead, this Court has long held that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the

principle of separation of powers has occurred." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989), and *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

Applying this well-settled rule, this Court has upheld numerous broad assignments of authority to the executive. *See, e.g., National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (affirming Federal Communication Commission's authority to regulate broadcast licensing in the "public interest"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding FCC's authority to issue regulations "as public convenience, interest, or necessity requires"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding Federal Power Commission's authority to determine "just and reasonable rates"). In recent years, this Court has strongly reaffirmed Congress's authority to use broad guidelines in assigning authority to the executive. *See Skinner*, 490 U.S. 212; *Touby v. United States*, 500 U.S. 160 (1991); *Loving v. United States*, 517 U.S. 748 (1996).

In determining whether Congress has satisfied the requirements of the nondelegation doctrine, this Court's unbroken practice has been to consult the challenged statute itself–its language, purpose, history, and context. *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Examination of these features of the Clean Air Act demonstrates that the Act is constitutional.

A. The Language And Purpose Of The Clean Air Act Significantly Constrain Agency Discretion.

In the Clean Air Act, Congress has answered all of the most difficult and basic questions about the structure and content of the NAAQS program. It has described in detail the substantive requirements for these standards; limited their jurisdictional reach; and set forth the procedures to be followed in setting them. As explained below, at every

important decision-point in the process of setting air quality standards, EPA's discretion is constrained by a choice Congress has made. With its multiple substantive constraints on the actions of a federal agency, its limited jurisdictional reach, and its abundant procedural protections, the Clean Air Act is clearly constitutional.

Substantive constraints. The Clean Air Act places numerous substantive constraints on EPA's decisions setting the NAAQS. First of all, the Act constrains EPA's discretion by excluding some factors from EPA's consideration. In setting the NAAQS, EPA may consider only the effects of the relevant air pollutant on human health and welfare.[78] As EPA has recognized since it issued the very first NAAQS thirty years ago, it may not consider economic and technological feasibility in setting the NAAQS.[79] In excluding the consideration of costs and technology and focusing only on human health and welfare, Congress squarely confronted the most difficult and most basic choice a decisionmaker faces when devising environmental standards–whether the government should trade off human lives and health for dollars–and firmly answered "no." *Cf. Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in judgment) ("*Benzene*").

Second, the Act also sets forth the factors EPA *must* consider in establishing the NAAQS. NAAQS must be "based on" the air quality criteria, CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1), which, in turn, must be based on "the latest scientific knowledge useful in indicating the kind and extent of all

---

[78]*See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1) (NAAQS to be "based on" air quality criteria); CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (criteria to describe scientific information on health and welfare effects of pollutants).

[79]*See* 36 Fed. Reg. 8186 (1971) (explaining that EPA did not consider comments concerning feasibility because "the Clean Air Act, as amended, does not permit any factors other than health to be taken into account in setting the primary standards").

identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . . ." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Virtually every one of the words in the quoted passage significantly constrains EPA's discretion.

EPA must base the NAAQS on *the latest scientific* knowledge–not on outdated information, not on nonscientific data. EPA must be cognizant of *all identifiable effects* on public health and welfare. Yet the agency must also bear in mind the *kind and extent* of these effects–which is another way of saying that EPA should distinguish among effects based on their severity and magnitude.

In addition, the statute's emphasis on *public* health directs EPA's attention to populations rather than individuals, thus precluding EPA from setting a NAAQS in order to protect a single individual from harm. In this way, the Clean Air Act is very different from the Occupational Safety and Health Act, at issue in *Benzene*. That statute aspires to achieve workplaces in which "*no employee*" suffers a "material impairment of health or functional capacity" from toxic materials or harmful physical agents. 448 U.S. at 612 (emphasis added). A plurality of Justices thus worried that the statute might allow the government to require large expenditures based on "the mere possibility that some employee somewhere in the country may confront some risk of cancer." *Id.* at 652. Such a "possibility" is simply not the basis for regulation under the Clean Air Act.

In so prescribing the range of findings EPA must make and the range of factors it must consider, the Clean Air Act is a close cousin to the statutes this Court has recently upheld against nondelegation challenges. *See Touby*, 500 U.S. at 166-67; *Skinner*, 490 U.S. at 219-20; *Mistretta*, 488 U.S. at 375-77.[80]

---

[80]Indeed, in *Loving v. United States*, 517 U.S. 748 (1996), this Court concluded that the federal statute giving the President authority to define the aggravating factors that permit a court-martial to impose the death penalty need not give *any* guidance to the executive in order to survive a nondelegation challenge. *See Id.* at 772-73.

The Clean Air Act not only tells EPA what to consider in setting the NAAQs, it also gives the agency a great deal of guidance as to the ultimate content of the standards. First of all, EPA must set the primary NAAQS at a level which is "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The use of the term "requisite" limits EPA's standard-setting discretion on both the low and high ends; it implies a degree of necessity for the standards and yet also forbids the Administrator to set standards inadequate to protect the public health.

In addition, EPA must allow "an adequate margin of safety" in setting the primary NAAQS. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The requirement of a margin of safety prescribes a particular approach toward scientific uncertainty for EPA; where the science is uncertain, it tells EPA to lean toward the more stringent end of the range of alternative standards rather than toward the less stringent end.

Finally, the NAAQS for any given pollutant must be uniform throughout the country. *See* 42 U.S.C. § 7409(a)(1). The question whether to permit variations in the national air quality standards[81]–to account for differing regional or local conditions in weather, population densities, etc.–is a public policy issue of the highest order. Congress squarely addressed that issue and decided against nonuniform standards. In this way as well, the Clean Air Act resembles the statute upheld against a nondelegation challenge in *Skinner*, which precluded a case-by-case determination of the governing rules and opted instead for a uniform rule. *See* 490 U.S. at 219.

Jurisdictional limits. The NAAQS apply to only a limited subset of air pollutants – widespread pollutants (i.e., those from "numerous and diverse sources") that endanger public health or welfare. CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1). Indeed, since 1978, as noted above, the NAAQS program has

[81]States are free, of course, to set stricter standards if they wish, CAA § 116, 42 U.S.C. § 7416, but the *national* standards must be uniform.

been limited to only *six* air pollutants, out of the many hundreds of such pollutants that exist today.[82] Thus, as in *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939), the territory over which the executive's discretion may range is extremely limited. *See id.* at 576 (authorizing Secretary of Agriculture to issue orders with respect to only certain kinds of agricultural commodities).

The reach of any given NAAQS is limited as well. EPA must review every NAAQS, and the criteria on which the NAAQS are based, every five years. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). This requirement has caused EPA to conduct numerous reviews and revisions of the criteria and NAAQS. See note 3, *supra*. Indeed, the NAAQS at issue here grew out of EPA's obligatory review of the criteria documents for PM and ozone. EPA's continuing obligation to revisit the criteria and NAAQS means that the life span of any given NAAQS is limited to the period in which the scientific data on which it is based remains reliable.

In the latter respect, the Clean Air Act is more restrictive than some congressional assignments of authority this Court has upheld. In *Field v. Clark*, 143 U.S. 649 (1892), this Court affirmed Congress's authority to assign to the President the task of suspending free trade in certain commodities, under certain conditions, "*for such time as he shall deem just.*" *Id.* at 680 (emphasis added). The Court concluded that the President "had no discretion in the premises except in respect to the duration of the suspension so ordered," and that this discretion "related only to the enforcement of the policy established by Congress." *Id.* at 693. In limiting the duration of any one decision on the NAAQS, therefore, the Clean Air Act is more restrictive than the statute upheld in *Field*.

Procedural requirements. The Clean Air Act also contains

[82]The Clean Air Act's program addressing toxic air pollutants, for example, covers approximately 180 different pollutants. *See* CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1).

numerous procedural requirements that further limit the Administrator's actions. First of all, the Act requires EPA to develop and rely on the criteria document. In providing that the original NAAQS were to be based on the criteria documents HEW had compiled as of 1970,[83] the Act guides EPA's development of the criteria on which the NAAQS depend. As discussed in our Statement, *supra*, at 14-17, HEW's criteria considered only scientific information on pollutants' effects on health and welfare; looked carefully at effects on especially vulnerable subpopulations; and candidly acknowledged the uncertainties attendant upon predicting the adverse effects of air pollution. Congress's endorsement of HEW's criteria documents thus provides substantial guidance to EPA in its development of such documents.

Second, the Act also requires EPA to consult with CASAC in formulating the criteria and in shaping NAAQS in light of the criteria. The Administrator may significantly depart from CASAC's recommendations only if she explains why she has done so. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). In this case, when CASAC was able to achieve a scientific consensus, the Administrator's actions hewed closely to it. In setting the ozone standard, for example, the Administrator considered ozone levels only within a range approved by CASAC and declined to set the standard at the lowest end of that range in part because no member of CASAC had endorsed such a low standard. NAAQS for Ozone, 62 Fed. Reg. at 38,861, 38,868.

Third, the Administrator's actions are subject to the exacting requirements of the Administrative Procedure Act and judicial review for arbitrariness. This Court has suggested that procedural requirements and the availability of judicial review are important factors in evaluating the propriety of Congress's assignments of authority to the executive branch. *See American Power & Light Co.*, 329 U.S. at 105; *Touby*, 500 U.S. at 168-69.

Finally, the administrative official–the Administrator of the

---

[83]CAA §§ 109(a), (b), 42 U.S.C. §§ 7409(a), (b).

EPA–to whom authority is granted is "clearly specified," and is a politically accountable official of "high governmental authority." *Lichter v. United States*, 334 U.S. 742, 787 (1948).[84]

Containing as it does these manifold constraints on the substance, scope, and process of the NAAQS program, the Clean Air Act compares extremely favorably to the assignments of authority from Congress to the executive that this Court has upheld, many of which have left large and basic questions for the agency to address.[85] In addition to the cases already cited above, see, for example, *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *OPP Cotton Mills v. Administrator Wage & Hour Div., Dept. of Labor*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944).

Furthermore, the Clean Air Act is a world away from the only statute this Court has ever invalidated under the delegation doctrine. In two cases decided in 1935, this Court invalidated two separate provisions of the National Industrial

---

[84]Furthermore, because the Administrator is charged not only with setting the NAAQS but also with ensuring their implementation by the states, CAA §§ 110, 179, 42 U.S.C. §§ 7410, 7509, and because the NAAQS themselves contain elements–such as their "form"–that partake of both lawmaking and executive functions, this case does not present a situation in which the entity to whom authority has been assigned exercises nothing but the lawmaking function. *Cf. Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

[85]As one member of the Court has aptly observed:

> By no means can the environmental laws be considered among those conferring the greatest amount of discretion upon the agencies. In fact, they are probably among those conferring the least. Not only is general policy not left to be disposed of by the agencies under the general standards of "public interest, convenience and necessity," but in some areas even cost-benefit analysis is excluded. For example, national primary ambient air quality standards are to be established not in light of what is "feasible" or "reasonable" (a formulation that would enable counterbalancing costs to be offset against the benefit of clean air) but rather on the sole basis of what is "requisite to protect the public health."

Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 102 (1987) (citing CAA § 109(b), 42 U.S.C. §7409(b)).

Recovery Act of 1933. In *A.L.A. Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935), the Court zeroed in on the delegation of lawmaking authority to private groups in invalidating section 3 of the statute, *id.* at 521-25, and in *Panama Refining Co. v. Ryan*, 295 U.S. 388 (1935), the Court fixed on the lack of any operative rule in invalidating a criminal conviction under section 9 of the statute. *Id.* at 412-13. *See also Clinton v. City of New York*, 524 U.S. 417, 486 (1998) (Breyer, J., dissenting) (noting distinctive facts of both cases). Neither of these extreme circumstances is present here.

The Clean Air Act clearly lays down the "intelligible principle" that this Court has required of assignments of authority from Congress to the executive. Moreover, given that EPA has interpreted the Act in a way that heeds all of these constraints on its own discretion, the EPA's *interpretation* of the Act is likewise constitutional.

B. The History Of The Clean Air Act Unequivocally Shows That Congress Has Not Forsaken Its Legislative Duties.

The delegation doctrine "has developed to prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 758. It is thus highly relevant that Congress has, from the beginning, kept an exceedingly close eye on the development of air quality criteria and standards and has frequently altered statutory requirements in response to agency decisions and experience. Far from abdicating its legislative role, Congress has actively shaped the contours of the federal program protecting air quality. Indeed, all of the constraints discussed in the preceding section were forged in Congress based on an ongoing dialogue with the executive agency charged with implementing the Clean Air Act.[86]

Congress entered the field of air pollution regulation with

[86]The discussion that follows is more fully presented, with detailed supporting citations, in our Statement of the Case, *supra*, at pp. 7-19.

some reluctance. It began its efforts to address the problem of air pollution by putting the federal government in the role of supporting state and local governments' own regulatory efforts through research and, eventually, through the development of criteria documents describing the consequences of air pollution for human health and welfare. Only after over a decade had passed in which little progress had been made in controlling air pollution did Congress require the federal government itself to regulate the quality of the outdoor air. Thus, the question of *who* sets the NAAQS was resolved, and resolved in favor of having the federal government set them, only after considerable deliberation. What is more, when Congress enlarged the federal role in this way, it at the same time narrowed the class of pollutants to which the air quality standards would apply.

The content of the standards themselves was also refined over a period of years. When states and local governments were expected to set air quality standards, there was no requirement of uniformity among the standards. When Congress gave EPA authority to set national standards, however, it made them nationally uniform. Likewise, when states and local governments were setting the standards, there was no requirement that a margin of safety be incorporated in the standards. In its criteria documents, however, HEW had discovered that the lowest pollution levels at which health effects are detected may not be the lowest level at which such effects occur. Thus it recommended that a margin of safety be incorporated in state and local air quality standards, and Congress endorsed this recommendation in the 1970 amendments to the Clean Air Act. And, last, when the standards were set by states and local governments, they needed only to be "consistent with" the air quality criteria developed by HEW; when EPA was given the responsibility of setting the NAAQS, however, the standards were required to be "based on" the air quality criteria. At the same time as it more closely tied the standards to the criteria, Congress also

gave more guidance as to what the criteria themselves should contain: it required that the very first NAAQS be based on the criteria documents HEW had already compiled, documents which highlighted sensitive subpopulations and scientific uncertainty, two themes that continue to characterize air pollution research and control to this day.

Finally, when Congress in 1970 greatly increased the federal government's role in the regulation of air pollution, it also strengthened the procedural protections attendant upon the government's decisions. The requirement that EPA consult with CASAC regarding the criteria and standards, the obligation to review and, if appropriate, revise the criteria and NAAQS at least every five years, and the opportunity for public comment and judicial review, all emerged in tandem with the federal government's increasing role in protecting the quality of the air we breathe.

The current shape and content of the air quality criteria and standards are thus the products of not just one, but many, congressional decisions made over a period of decades. These congressional decisions, moreover, came in response to the executive's own experience in implementing federal air pollution policy. The tradition of dialogue and collaboration between Congress and the executive reflected in these decades of congressional and executive actions shows that the purpose of the nondelegation doctrine–to prevent Congress from forsaking its legislative role, *Loving*, 517 U.S. at 758–is amply satisfied by the active congressional engagement that has given the Clean Air Act the form it has today.

C. The Context Of The Clean Air Act–The Control Of Air Pollution In Conditions Of Uncertainty–Would Be A Particularly Inappropriate Setting For A Reworking Of The Nondelegation Doctrine.

As explained above, the Clean Air Act clearly satisfies this Court's requirements for assignments of authority from

Congress to the executive. The court below, however, seems to have believed that a reworking of these requirements was appropriate in this context. Specifically, the court seems to have required–from Congress *or* EPA, it did not care which, State Pet. App. 12-13–*numerical*, or *quantitative*, guidance for the agency. This new requirement is evident in the court's hints as to the kinds of guidance that would, in its view, be constitutionally satisfactory: cost-benefit analysis, "generic unit[s] of harm," and quality-adjusted life-years. State Pet. App. 13-17. All of these approaches would make regulatory action turn on quantitative guidelines.

This Court has never required the kind of quantitative guidance from Congress (or from the agency itself) that the court of appeals seems to have required. Indeed, in the flood of delegation litigation inspired by his Court's rulings in *Schechter* and *Panama Refining*, this Court addressed and rejected precisely this kind of claim. In a series of cases brought before the Court in the 1940s, regulated entities objected to giving *any* policymaking discretion to agencies at all, and the federal government responded by denying, for example, that Congress was required to establish a "mathematical formula" for agency action. Brief for United States at 62, *Lichter v. United States*, 334 U.S. 742 (1948) This Court squarely rejected the claim that Congress must speak with mathematical precision:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.

Lichter, 334 U.S. at 785. The Court recognized that requiring such specificity from Congress would require forgoing the advantages of turning to an administrative agency in the first place:

> [T]he effectiveness of both the legislative and administrative processes would become endangered if

> Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues.

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

In recent years, this Court has had an opportunity to revisit its precedents upholding Congress's power to assign responsibility to the executive under broad qualitative guidelines. In *Skinner*, 490 U.S. 212, the Court faced a challenge to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99-272, 100 Stat. 82. COBRA directed the Secretary of Transportation to set pipeline safety user fees that bore a "reasonable relationship" to volume-miles, miles, or revenues. 490 U.S. at 219. In a unanimous opinion, this Court said that it had "no doubt" that COBRA's restrictions on the Secretary's discretion satisfied the requirements of the delegation doctrine, *id.* at 220, despite the fact that COBRA, like the Clean Air Act, uses qualitative guidelines to govern the establishment of quantitative fees.[87]

This Court also had an opportunity to revisit the nondelegation doctrine in *Touby*, 500 U.S. 160. Petitioner challenged Congress's assignment of authority to the Attorney General to schedule controlled substances–and thus to criminalize their possession and distribution–on a temporary basis. A unanimous Court again had no trouble finding that the Controlled Substances Act's standard of "imminent hazard to public safety"–which required consideration of the drug's "history and current pattern of abuse," the "scope, duration, and significance of abuse," and "what, if any, risk there is to the public health"–was the kind of "intelligible principle"

[87]Indeed, the only significant issue in that case was whether assignments of authority to the executive made pursuant to Congress's taxing power should be scrutinized more strictly than other assignments have been; the answer to this question was no. *See* 490 U.S. at 222-23.

required by its delegation decisions. *Id.* at 166-67. The standard requiring an "imminent hazard to public safety" poses challenges for the Attorney General that are strikingly similar to those faced by EPA in setting the NAAQS. Nowhere in *Touby* did this Court suggest that the Controlled Substances Act was problematic because it did not supply quantitative limits for the Attorney General's discretion.

The notion, embraced by the court below, that a congressional assignment of authority, or an agency's exercise of that authority, is constitutionally defective because it does not specify precise stopping points for regulation would require fundamental restructuring of much of modern government. A good deal of legislation takes precisely the same form that the court of appeals found unconstitutional: a qualitative directive to the agency–to set utility rates that are "just and "reasonable,"[88] to set pipeline fees based on a "reasonable relationship" to revenue and other factors,[89] or to regulate the height and width of bridges to prevent navigational obstructions,[90] to name only a few examples–must be translated by an agency into a numerical rule. The Court has never invalidated this kind of legislation, and it would be a grave error to begin to do so now.

In the context of air pollution control, as in many other regulatory settings, requiring a quantitative meta-standard from Congress (or from an agency) would effectively preclude much governmental action. Given the dynamic nature of scientific inquiry and the multifarious issues that arise when regulating air pollutants that have very different effects, and mechanisms of effects, on human health and welfare, it would be quite impossible to devise in advance a catch-all,

[88]*Hope Natural Gas*, 320 U.S. at 600.

[89]*Skinner*, 490 U.S. at 219.

[90]*Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (upholding against nondelegation challenge federal statute assigning authority to Secretary of War to regulate height and width of bridges over navigable waterways).

quantitative standard to govern all decisions setting NAAQS. The human health effects alone of air pollution – quite apart from the multitudinous effects on human welfare – vary widely, including such different effects as the initiation and aggravation of respiratory diseases including bronchitis[91] and asthma,[92] impairment of the oxygen-carrying capacity of the blood,[93] reduced cognitive capacity,[94] and premature death.[95] Moreover, because air pollutants' harmful mechanisms vary, the technical issues that arise in identifying pollutants' consequences vary as well.[96]

To require Congress (or, as the D.C. Circuit did, the agency) to foresee and address all of the subsidiary issues that arise in regulating air pollutants would be to prevent Congress from assigning authority to the executive at all in this context. This Court has never required such a degree of specificity from Congress as would effectively preclude congressional action on a particular problem. On the contrary, this Court has recognized that "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Loving*, 517 U.S. at 758. Indeed, it is fair to say that "a certain degree of discretion, and thus of lawmaking,

---

[91] *See* 1971 NOx Criteria Doc., *supra*, at 11-8.

[92] *See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[93] *See* 1970 CO Criteria Doc., *supra*, at 10-3.

[94] *See* EPA, Air Quality Criteria for Lead 13-6 (1977) [hereinafter 1977 Lead Criteria Doc.].

[95] *See* 1967 SOx Criteria Doc., *supra*, at xxix.

[96] *See, e.g.*, 1977 Lead Criteria Doc., *supra*, at 13-1 to 13-4 (discussing complexities of isolating effects of airborne lead exposure from other lead sources and identifying relationship between exposure levels and blood concentrations of lead); 1970 CO Criteria Doc., *supra*, at 10-3 to 10-4 (addressing relationship between carbon monoxide exposure levels and resulting levels of carboxyhemoglobin in blood).

inheres in most executive or judicial action . . . ." *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting). This Court has always held, therefore, that Congress may "seek[] assistance, within proper limits, from its coordinate Branches . . . . Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby*, 500 U.S. at 165. The court of appeals' reworking of the nondelegation doctrine is an effective but misguided means of achieving deregulation through the courts rather than Congress.

II. THE LOWER COURT'S DECISION CONSTRAINING ENFORCEMENT OF THE REVISED OZONE STANDARD IS INCONSISTENT WITH THE CLEAN AIR ACT'S LANGUAGE, HISTORY, AND PURPOSE, AND WITH EPA'S REASONABLE INTERPRETATION OF THE ACT.

Two sets of provisions govern the classifications, attainment dates, and control measures required of areas that are in nonattainment for ozone. The question posed here is which of these sets of provisions governs the implementation and enforcement of EPA's revised ozone standard.

The first candidate is Subpart 1, CAA §§ 171-179B, 42 U.S.C. §§ 7501-7509a. Subpart 1 governs nonattainment areas generally. It allows EPA to classify nonattainment areas according to the severity of their air pollution problem and to fix attainment dates in accordance with EPA's classifications. CAA § 172(a)(1)(A), 42 U.S.C. §7502(a)(1)(A). If, for example, an area has a particularly severe nonattainment problem, it may be given a different classification and later attainment date than an area with a less severe problem. In all events, however, nonattainment areas must achieve the NAAQS no later than five years after their designation as nonattainment areas. CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A). Subpart 1 also allows EPA to require specific reductions in emissions

for the purpose of meeting the NAAQS on schedule. CAA §§ 172(c)(2), 171(1), 42 U.S.C. §§ 7502(c)(2), 7501(1) (requiring "reasonable further progress" as defined by EPA).

The second candidate is Subpart 2, CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f. In contrast to Subpart 1, Subpart 2 sets forth explicit, rigid classifications and attainment dates for areas in nonattainment for ozone. The classifications, ranging from "moderate" to "extreme," are based on ozone concentrations ("design values") ranging from 0.121 to 0.280 parts per million ("ppm"). CAA §181(a)(1), 42 U.S.C. § 7511(a)(1). The "design values" used to classify areas are based on the statistical form of the ozone standard existing in 1990. *Id.* Most of the explicit attainment dates established in Subpart 2 were in the 1990s. *Id.*

The issue raised here is whether EPA's implementation and enforcement of the revised ozone standard–which specifies a different level and form from the level and form referenced in Subpart 2, and which, if it is to be implemented and enforced at all, must obviously be implemented and enforced *after* the 1990s–must conform to the classifications, attainment dates, and control measures specified in Subpart 2.

The court of appeals answered yes to this question. Because section 181(a)(1) of Subpart 2 refers to nonattainment designations made under "*section 7407(d)*," the court reasoned, the classifications and attainment dates specified in Subpart 2 apply to areas designated as nonattainment under *any* of the subsections of section 107(d)–including subsection 107(d)(1), under which designations are made following the revision of a NAAQS. State Pet. App. 34-35. Thus, classifications, deadlines and requirements for areas designated as nonattainment pursuant to the revised ozone NAAQS are, on the court's view, governed by Subpart 2.

The proper interpretation of the court's ruling is in some doubt even after the court's attempts at clarification on rehearing. Industry petitioners argued below that Subpart 2, added in the 1990 amendments to the Act, "preclude[s] the

EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS," and the court apparently agreed with this argument. State Pet. App. 37.[97] This would preclude *any* implementation or enforcement of the revised ozone standard beyond what was already required pursuant to the one-hour standard existing in 1990 (which would be tantamount to saying that the revised standard can be set but cannot be enforced). A second possible interpretation of the court's interpretation was offered by Judge Tatel: he concurred in the court's opinion on rehearing because he thought it left open the possibility that the revised ozone standard can at least be enforced in areas that have achieved the one-hour standard. State Pet. App. 81.

Under either interpretation of the court's ruling, the ruling is erroneous in light of the language, history, and purpose of the relevant provisions of the Clean Air Act. Subpart 2 clearly applies only to the ozone standard existing in 1990, when Subpart 2 was enacted. Where Congress has, as it has done here, answered the "precise question at issue," the Court must abide by Congress's answer. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even were the provisions less clear than we believe them to be, however, this Court should reach the same result by deferring to EPA's reasonable interpretation of the statute. *Id.*

Section 181(a) of Subpart 2 provides, as its title says, "classifications and attainment dates for 1989 nonattainment areas." CAA § 181(a), 42 U.S.C. § 7511(a). Three out of the five attainment dates specified in section 181(a)(1) of Subpart 2 have already passed. *See* 42 U.S.C. § 7511(a)(1), table 1 (three of the attainment dates are 1993, 1996, and 1999).

Areas "designated nonattainment for ozone pursuant to

---

[97]This interpretation is apparently embraced by respondents/cross-petitioners Appalachian Power Co., *et al.* *See* Brief in Response [to the Petitions for Certiorari] for the Respondents Appalachian Power Co. in No. 99-1257, *et al.* at 9, 28.

section 7407(d)" are to be "classified at the time of such designation, under table 1, by operation of law . . . ." 42 U.S.C. § 7511(a)(1). The classifications in table 1 range from "marginal" to "extreme." 42 U.S.C. § 7511(a)(1). These classifications are tied to the area's "design value," which is measured in parts per million ("ppm") of ozone in the ambient air. 42 U.S.C. § 7511(a)(1) (table 1, n. *). The design values in table 1 of section 181(a)(1) range from 0.121 to 0.280 and above. *See* 42 U.S.C. § 7511(a)(1).

Section 181(a)(1) requires that the design value that determines classification under this section be "calculated acccording to the interpretation methodology issued by the Administrator most recently before November 15, 1990." 42 U.S.C. § 7511(a)(1). The relevant interpretation methodology stated that design value was to be calculated based on the fourth highest daily maximum value during a three-year period.[98] EPA focused on this particular value because, at that time, the form of the ozone standard required that the average number of exceedances over a three-year period not be greater than one.[99] Thus the highest three daily values in a three-year period were used to determine the compliance status for an area, and the fourth highest value was used to determine its design value.

The language of Subpart 2 clearly shows that this set of provisions was meant to apply only to the one-hour ozone standard, existing in 1990. First, the title of section 181(a), which sets forth the classifications and attainment dates, is "[c]lassifications and attainment dates for *1989 nonattainment areas*." CAA § 181(a), 42 U.S.C. § 7511(a) (emphasis added). Second, the lowest design value reflected in section 181–0.121

---

[98] *See* Memorandum from William G. Laxton, Director, Technical Support Division, U.S. EPA, "Ozone and Carbon Monoxide Design Value Calculations" (June 18, 1990) <http:www.epa.gov/airprogm/oar/oaqps/greenbk/laxton.html>.

[99] *See* NAAQS for Photochemical Oxidants, 44 Fed. Reg. at 8218.

ppm–is keyed to the level of the one-hour standard (0.12 ppm), and hence does not capture the lower values that will be associated with the revised ozone standard which sets a maximum level of .08 ppm. Third, the interpretation methodology that the statute requires to be used in calculating an area's design value mandates use of the statistical form of the *prior one-hour* ozone standard. Finally, the deadlines set forth in Table 1 of section 181(a)(1) are mostly in the past and, likewise, the deadline clocks for the implementation of the specific control measures required by Subpart 2 begin to run from *1990*. *See generally* CAA § 182, 42 U.S.C. § 7511a.

The language of Subpart 1 is equally supportive. Section 172 provides that the Administrator may classify, and set an attainment date for, an area designated as nonattainment "pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (*or any revised standard, including a revision of any standard in effect on November 15, 1990*). . . " CAA § 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) (emphasis added). Clearly, Congress believed that there would be classifications and attainment dates set under section 172(a)(1)(A) for areas designated as nonattainment under a standard revised after November 15, 1990. Yet if the court of appeals is correct, the category Congress sought to create would be a null set: each of the sets of provisions governing areas in nonattainment for NAAQS existing in 1990 (Subparts 2-5) contains the same reference to "section 107(d)" that the court believed made Subpart 1 inapplicable to the revised ozone standard. Thus, under the court of appeals' reasoning, *no* revised standard would be governed by Subpart 1, rendering section 172(a)(1)(A) a nullity.

All of this language from Subparts 1 and 2 points to only one conclusion: Subpart 2 simply does not apply to the revised ozone standard. This conclusion is bolstered by considering the absurd consequences that would flow from a contrary ruling.

First, it is not even possible to classify areas under section

181(a)(1) pursuant to the revised ozone standard, given the constraints of that section. Section 181(a)(1) requires that an area's design value–which determines the area's classification, which in turn determines its attainment date–be calculated according to the interpretation methodology in effect before November 15, 1990. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). That methodology required use of the statistical form of the ozone standard existing in 1990, not the revised standard. Thus no calculation of a design value under section 181(a)(1) can use the form of the revised standard. Because the form of the ozone standard is a crucial part of the standard itself, this means that design values using the revised ozone standard simply cannot be calculated within the constraints of section 181(a)(1).

That is bizarre enough. Coupling this result with another aspect of the court of appeals' ruling only deepens the awkwardness. Under the court's decision, EPA was permitted, indeed required, to review and, if appropriate, revise the former ozone standard. EPA was also required to designate areas as attainment or nonattainment pursuant to its revised standard. Because section 181(a)(1) provides that classification must occur "at the time of . . . designation," 42 U.S.C. § 7511(a)(1), EPA will also be required to *classify* the areas that it has designated as nonattainment under the revised standard. But because, as just discussed, it is impossible, within the constraints of section 181(a)(1), to set design values and classifications according to the revised ozone standard, EPA will be forced to set such design values and classifications according to the one-hour standard existing in 1990. Thus, in classifying areas pursuant to its obligations under section 181(a)(1), EPA will be forced to do so based on the very ozone standard it has rejected as inadequate to protect public health. The court of appeals' interpretation of section 181(a)(1) thus requires EPA to spend scarce regulatory resources on a pointless exercise yielding no legally relevant data.

The court of appeals' decision leads to obviously wrong results in another way as well. Because most of the deadlines set by Subpart 2 have passed, enforcement of the revised ozone standard either will require a new set of deadlines or will follow from a finding that some areas *are already out of compliance with the revised standard, and have been so for years.* Under the first scenario, the new deadlines cannot come from Subpart 2 because most of the deadlines set in Subpart 2 have already passed. EPA needs the authority to develop a new set of deadlines for meeting requirements under the revised ozone standard, and that kind of authority comes from Subpart 1, not Subpart 2. Under the second scenario, in which the attainment dates of Subpart 2 would control, some areas would be out of compliance with the revised standards as soon as they were designated nonattainment–raising at least the potential that sanctions would be imposed for having missed a deadline that passed before the relevant rule was developed. Both scenarios show the unworkable nature of the court of appeals' decision.

The reference to "section 107(d)" in section 181(a)(1), on which the court of appeals so heavily relied, does not support a different conclusion. The court found that Congress's failure to refer specifically to section 107(d)(4) (rather than to section 107(d) as a whole) meant that EPA could not enforce the revised ozone standard except in conformity with Subpart 2. In so holding, the court of appeals ignored all of the other language in Subpart 2, which supports the opposite conclusion. The consistent exclusive focus of Subpart 2 is the ozone NAAQS existing at the time Congress added Subpart 2 in 1990. Certainly, section 181(a)(1)'s reference to designations made under "section 107(d)" is not incompatible with a finding that the designations central to Subpart 2 are those designations made immediately following the amendments of 1990–designations made pursuant to section *107(d)(4)*.

While it is true that the Senate version of the 1990 bill amending the Clean Air Act contained a reference to the equivalent of section 107(d)(4), and the House version

contained a reference to section 107(d), and the House's version became law, nothing follows from this. Not only, as noted above, does all of the other language of Subpart 2 show that it applies only to the ozone standard existing in 1990, but nothing in the history of this section suggests that Congress – with the omission of a single number "(4)" from a vast bill – intended effectively to preclude EPA from implementing a revised ozone standard. Indeed, the House Report on the bill described the provision that became section 181(a) as follows: "Designated ozone nonattainment areas are classified by operation of law as marginal, moderate, serious, severe, or extreme areas based on the design values for the area *under the existing ozone NAAQS.*"[100] This explanation of the House's version of the bill confirms the conclusion that Subpart 2 applies only to the "existing ozone NAAQS" – that is, the ozone NAAQS that existed in 1990, when the Amendments were passed, rather than to any revised ozone standard.

At the very least, the cascade of language in Subpart 2 indicating that Subpart 2 applies only to the prior one-hour ozone standard, combined with the absence of the single number (4) in section 181(a)(1), creates an ambiguity that EPA is entitled to resolve as long as it does so reasonably. *See Chevron*, 467 U.S. at 866. As set forth above, EPA's interpretation of Subpart 2 to apply only to the ozone standard existing in 1990 creates a sensible regulatory regime in which EPA's obligation to revise the NAAQS, and to designate areas according to their attainment status under the revised NAAQS, is not rendered empty by a senseless limit on EPA's authority to implement and enforce the revised standard.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

---

[100]H.R. Rep. No. 101-490, at 229 (1990) (emphasis added).

Respectfully submitted.

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attys. General, N.J.
Richard J. Hughes Justice
Complex 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

EDWARD G. BOHLEN
Assistant Atty. General, Mass.
200 Portland Street
Boston, MA 02114
(617) 727-2200, ext. 3358

LISA HEINZERLING
Counsel of Record
Special Asst.Atty. General, Mass.
Special Counsel, New Jersey
Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9115

(17)

No. 99-1257

Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITIONER

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for American Lung Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

65pp

QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. § 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Respondent American Lung Association (ALA) was an intervenor in the court of appeals. ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

The following were parties in one or both of the two consolidated proceedings addressed by this petition for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company

**RULE 29.6 DISCLOSURE,
AND LIST OF PARTIES BELOW** – Continued

Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company
Ohio Mining and Reclamation Association
Ohio Power Company

**RULE 29.6 DISCLOSURE,
AND LIST OF PARTIES BELOW** – Continued

Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

TABLE OF CONTENTS

Page

CITATIONS TO DECISIONS ENTERED IN THE CASE 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 1

Particulate matter 2

Ozone 6

Proceedings Below 11

SUMMARY OF THE ARGUMENT 12

Nondelegation 12

Ozone Implementation 14

ARGUMENT 15

I. THE CLEAN AIR ACT, AND EPA'S INTERPRETATION OF THE ACT, PASS MUSTER UNDER THE NONDELEGATION DOCTRINE 17

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy the Nondelegation Doctrine 17

(1) The Language of the Act, Both Alone and Considered in Light of the Statutory Context and Legislative History, Establishes Intelligible Principles 18

1970 Act 18

1977 Amendments 20

TABLE OF CONTENTS – Continued

Page

(2) Because the Clean Air Act Provides Sufficient Specificity to Permit Judicial Review, It Necessarily Also Provides Sufficient Intelligible Principles to Satisfy the Nondelegation Doctrine 23

(3) The Clean Air Act Clearly Satisfies The Nondelegation Approaches Espoused by Chief Justice Rehnquist and Justice Scalia 25

Chief Justice Rehnquist 25

Justice Scalia 26

B. The Nondelegation Doctrine Does Not Require a "Determinate Criterion" 27

(1) A "Determinate Criterion" Test Is Unsupportable Given the Nondeterminate Language in the Constitution Itself, and Contravenes This Court's Precedent Repeatedly Upholding Nondeterminate Statutes 27

(2) A "Determinate Criterion" Test Contravenes *Chevron* and Other Precedent of this Court Recognizing that Congress May Legitimately Leave Policy Decisions to Be Made By Agencies 29

(3) *Schechter* Refutes a "Determinate Criterion" Test 31

C. Because Congress Prescribed Intelligible Principles, the Nondelegation Doctrine Provides No Basis for a Narrowing Construction of the Act 32

TABLE OF CONTENTS – Continued

Page

(1) Requiring EPA to Narrow Its Interpretation of the Act Is Unwarranted in Light of the Act's Clear Constitutionality, Will Not Serve the Purpose of the Nondelegation Doctrine, and Contravenes Precedent of this Court 32

(2) The Present Case Differs Fundamentally from Those Where Narrowing Constructions Have Been Undertaken..... 33

II. THE D.C. CIRCUIT'S RULING CONCERNING IMPLEMENTATION OF THE REVISED OZONE NAAQS CONTRAVENES THE ACT..... 37

A. The Subpart 1 Classification and Attainment Date Provisions Apply to the New Ozone NAAQS..... 38

(1) Areas violating the new NAAQS, with design value less than 0.121 39

(2) Areas violating the new NAAQS, with design value ≥0.121..... 40

B. The Subpart 1 Control Measure Provisions Apply to the New Ozone NAAQS 42

C. Industry's and Ohio's Interpretation of the D.C. Circuit's Decision Simply Compounds the Unlawfulness of that Decision 44

(1) The Assertion that Areas Need *Never* Attain the New NAAQS Conflicts With the Act, and Even With the D.C. Circuit's Own Erroneous Interpretation of the Act..... 45

TABLE OF CONTENTS – Continued

Page

(2) The Assertion that Areas Need *Never* Attain the New NAAQS Reduces the Statutorily Mandated Revision of NAAQS to a Pointless Exercise, and Contravenes the Act's Core Public Health Purpose 45

D. As Amended on Rehearing, the D.C. Circuit's Decision Still Contravenes the Act... 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935) 31

American Lung Assn. v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 24

American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981) 6, 24

American Petroleum Inst. v. USEPA, 198 F.3d 275 (D.C. Cir. 2000) 40

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 32

American Textile Manufacturers Inst. v. Donovan, 452 U.S. 490 (1981) 25, 26, 30

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 46

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13, 29, 30, 31, 36, 37

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 12, 23

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) 20, 21, 22, 23, 24, 34

General Motors Corp. v. United States, 496 U.S. 530 (1990) 15

Heckler v. Chaney, 470 U.S. 821 (1985) 23

Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) ..... *passim*

Lead Industries Assn. v. USEPA, 647 F.2d 1130 (D.C. Cir. 1980) 24

Lichter v. United States, 334 U.S. 742 (1948) 28

Loving v. United States, 517 U.S. 748 (1996) 18

TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) .... *passim*

Natl. Broadcasting Co. v. United States, 319 U.S. 190 (1943) 18

Natl. Cable Television Assn. v. United States, 415 U.S. 336 (1974) 33

Natural Resources Defense Council v. Administrator, 902 F.2d 962 (D.C. Cir. 1990) 24, 25

Natural Resources Defense Council v. USEPA, 824 F.2d 1146 (D.C. Cir. 1987) 24, 25

Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941) 28

Rosado v. Wyman, 397 U.S. 397 (1970) 46

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 28

Touby v. United States, 500 U.S. 160 (1991) 18

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 15

United States v. Rock Royal Co-op, 307 U.S. 533 (1939) 29

United States v. Wilson, 503 U.S. 329 (1992) 46

Yakus v. United States, 321 U.S. 414 (1944) 19, 23, 29

CONSTITUTION AND STATUTES

United States Constitution, Article I, § 1 ..... 1, 32

United States Constitution, Article III, § 2 35

TABLE OF AUTHORITIES – Continued

Page

United States Constitution, Amendment II..... 28
United States Constitution, Amendment IV..... 28
United States Constitution, Amendment V..... 28
United States Constitution, Amendment VIII 28
28 U.S.C. § 1254..... 1
Clean Air Act § 107, 42 U.S.C. § 7407..... 41
Clean Air Act § 108, 42 U.S.C. § 7408
..... 1, 3, 12, 19, 22, 23
Clean Air Act § 109, 42 U.S.C. § 7409..... *passim*
Clean Air Act § 110, 42 U.S.C. § 7410.....27, 44
Clean Air Act § 113, 42 U.S.C. § 7413..... 27
Clean Air Act § 126, 42 U.S.C. § 7426..... 27
Clean Air Act §§ 171-182, 42 U.S.C. §§ 7501-7514a
.....37, 48
Clean Air Act § 172, 42 U.S.C. § 7502..... *passim*
Clean Air Act § 179, 42 U.S.C. § 7509.....37, 44
Clean Air Act § 181, 42 U.S.C. § 7511..... *passim*
Clean Air Act § 182, 42 U.S.C. § 7511a 37, 43
Clean Air Act § 307, 42 U.S.C. § 7607.....1, 11, 19
Pub. L. No. 95-95, § 401, 91 Stat. 790 (August 7, 1977).....20, 22

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

S. Rep. 1196, 91st Cong., 2d Sess. (1970) 19
H.R. Rep. 294, 95th Cong., 1st Sess. (1977) 20
S. Rep. 228, 101st Cong., 1st Sess. (1989)..... 48
H.R. Rep. 490, 101st Cong., 2d Sess. (1990).... 6, 42, 48

REGULATIONS

40 C.F.R. Part 50 49
40 C.F.R. § 50.7.....1, 3
40 C.F.R. § 50.10..... 1
40 C.F.R. § 81.300..... 41

FEDERAL REGISTER

36 Fed. Reg. 8186 (April 30, 1971) 6
44 Fed. Reg. 8202 (February 8, 1979).....3, 6
52 Fed. Reg. 24634 (July 1, 1987).....2, 3
58 Fed. Reg. 13008 (March 9, 1993) 6
61 Fed. Reg. 65716 (December 13, 1996).....10, 16
62 Fed. Reg. 38652 (July 18, 1997)..... *passim*
62 Fed. Reg. 38856 (July 18, 1997)..... *passim*

GLOSSARY

ALA	American Lung Association
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
CD	Criteria Document
EPA	Environmental Protection Agency
FTCA	Federal Trade Commission Act
µg/m3	micrograms per cubic meter
NAAQŠ	National Ambient Air Quality Standards
03	ozone
OSHA	Occupational Safety and Health Act
PM	particulate matter
PM2.5	particles less than or equal to 2.5 microns in diameter
PM10	particles less than or equal to 10 microns in diameter
ppm	parts per million
RIA	Regulatory Impact Analysis
RTC	Response to Comments
SP	Staff Paper

CITATIONS TO DECISIONS ENTERED IN THE CASE

American Trucking Assns. v. USEPA, 175 F.3d 1027 (D.C. Cir. 1999), App. 1a,[1] *rehearing granted in part, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), App. 90a; 62 Fed. Reg. 38652 (July 18, 1997); 62 Fed. Reg. 38856 (July 18, 1997).

BASIS FOR JURISDICTION

The D.C. Circuit's decision was entered on May 14, 1999, App. 1a, and rehearing was granted in part and denied in part on October 29, 1999. App. 90a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

U.S. Const., Art. I, § 1; Clean Air Act §§ 108, 109, 172, 181, 307, 42 U.S.C. §§ 7408, 7409, 7502, 7511, 7607; 40 C.F.R. §§ 50.7, 50.10. (*See* appendix to Environmental Protection Agency's petition.)

STATEMENT OF THE CASE

Acting pursuant to its duty to set national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety," Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1), the Environmental Protection Agency (EPA) has promulgated revised NAAQS for particulate matter (most importantly, for fine particles) and ozone. 62 Fed. Reg. 38711-12 (July 18, 1997), JA(PM) 61-62; 62 Fed. Reg. 38894-95 (July 18, 1997),

---

[1] Appendix citations refer to the appendix filed by the Environmental Protection Agency with its petition for certiorari.

JA(O) 39-40.[2] With respect to particulate matter, EPA has estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of the new standards. Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486. With respect to ozone, EPA has estimated that its new standards will each year prevent tens of thousands of occurrences of health effects including respiratory symptoms (such as pain on breathing), reductions in lung function, and asthma attacks (including hospital admissions and emergency room visits). 62 Fed. Reg. 38865/2-3, JA(O) 10; *id.* 38868/1, JA(O) 13.

Particulate matter. Particulate matter (PM) is a ubiquitous pollutant, consisting of fine particles produced largely by combustion or other high-temperature processes, and coarse particles mostly generated from mechanical processes through crushing and grinding. Criteria Document (CD) 3-145, JA(PM) 548; Staff Paper (SP) IV-3a, JA(PM) 1920. Over the years the public health significance of smaller particles has received increasing recognition. The original PM NAAQS promulgated in 1971 regulated particles up to 45 microns in diameter, 52 Fed. Reg. 24635/3 (July 1, 1987), JA(PM) 209, but EPA in 1987 promulgated revised NAAQS that addressed particles up to 10 microns in diameter ("PM10"). *Id.* 24663-64, JA(PM) 237-38. The PM NAAQS at issue here include a

---

[2] The particulate matter joint appendix compiled in the court of appeals is cited as JA(PM), and the ozone joint appendix as JA(O).

new NAAQS addressing "fine" particles, defined as those 2.5 microns in diameter or less. 40 C.F.R. § 50.7(a)(1).

These NAAQS were promulgated following a detailed and thorough review conducted by EPA pursuant to its statutory obligation to review and (as appropriate) revise NAAQS at no more than five-year intervals. CAA § 109(d). As required by the Act, EPA's review of the PM NAAQS involved presenting a comprehensive review and assessment of the state of the science regarding particulate matter and its health and environmental effects in a "criteria" document, which was reviewed by a special scientific advisory committee (the Clean Air Scientific Advisory Committee, or CASAC). *See* CAA §§ 109(d); 108(a)(2). According to the final chapter of the Criteria Document, described by CASAC as the "best ever example of a true integrative summary of the state of knowledge about the health effects of airborne PM," Letter of March 15, 1996 from George T. Wolff to Carol M. Browner at 2, JA(PM) 3150,

> the extensive PM epidemiologic database that has evolved during the past several decades . . . includes recent studies providing evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current U.S. PM standards.*

CD 13-1, JA(PM) 1779 (emphasis added). In sharp contrast to the "small" number of studies available in the 1987 PM review, 52 Fed. Reg. 24641/1, JA(PM) 215, and to other NAAQS reviews that have based standard-setting on a single study, 44 Fed. Reg. 8202/3 (February 8, 1979), JA(O) 3480 (noting that 1971 predecessor to the ozone

standard was based on a single study), the studies relied on in the 1997 PM review include "over 80" addressing short-term exposures, of which "[o]ver 60 . . . have found consistent, positive, significant associations between short-term PM levels and mortality and morbidity endpoints." SP V-54, JA(PM) 2011. *Accord, id.* V-61a, JA(PM) 2026 (listing additional statistically significant studies addressing long-term exposures). Significantly, when EPA plotted the results of the short-term exposure studies on a map, it concluded: "Although the highest PM-10 concentrations in the U.S. are in the West, most of the results in North America are from eastern communities, at PM-10 concentrations that are generally *below those permitted by the current standards.*" *Id.* front cover caption, JA(PM) 1900 (emphasis added).

As indicated, these PM-associated health effects include death, largely from respiratory and cardiovascular causes. SP V-58, JA(PM) 2019. In addition, the studies documented associations between particulate matter and exacerbation of emphysema and chronic bronchitis (which collectively are known as "chronic obstructive pulmonary disease"),[3] as well as pneumonia and cardiovascular disease. *Id.* V-20, 21 and 32, JA(PM) 1974, 1976, and 1989. These exacerbations can be serious enough to lead the affected individuals to visit the emergency room, and to lead attending physicians to order that they be admitted to the hospital. CD 13-30, JA(PM) 1808. Persons specially at risk from these effects include those over 65 years of age, as well as those below that age

[3] COPD is "the most common pulmonary cause of death, the fourth leading cause of death overall . . . , and a major cause of disability." SP V-33, JA(PM) 1990.

who have acute or chronic respiratory disease and/or cardiovascular disease, or who are current or former smokers. CD 13-92 to 13-94, JA(PM) 1870-72.

Having noted these effects, EPA found that fine particles – which differ in size, chemical composition and origin from coarse particles, SP IV-4 to IV-8, JA(PM) 1921-27 – were the appropriate indicator: "the fine particle studies consistently find positive, significant associations between fine particle levels and mortality and morbidity endpoints, with over 20 studies conducted in a number of geographic locations throughout the world, including the US, Canada, and Europe." SP V-76, JA(PM) 2047. Indeed, considering a study that compared the fine and coarse fractions, EPA found "clear evidence that fine particles are more likely to be responsible for the numerous observed associations between PM10 and mortality." SP V-64, JA(PM) 2031. *Accord, id.* V-67, JA(PM) 2037 (the 24-city study "provides clear evidence of an effect of fine particles that is independent of coarse fraction particles").

Considering these factors, and the near-unanimous recommendation of CASAC – including all four of the committee's epidemiologists – that a fine particle standard was warranted, Letter of June 13, 1996 from George T. Wolff to Carol M. Browner at Table 1, JA(PM) 3165, EPA opted to promulgate NAAQS for fine particles, measured as PM2.5. 62 Fed. Reg. 38711/3, JA(PM) 61 (setting annual standard at 15 µg/m3, and 24-hour standard at 65 µg/m3). The levels of the final standards are well within – indeed, "toward the middle portion of" – the range of protectiveness recommended by the eleven CASAC panelists who made recommendations as to level. Response to Comments (RTC) 29, JA(PM) 268.

Ozone. Like particulate matter, ozone is a widespread pollutant occurring in numerous regions of the United States. The primary ingredient in what is known as "smog," it is formed when two precursor pollutants (volatile organic compounds and nitrogen oxides) react to sunlight. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981); H.R. Rep. 490, 101st Cong., 2d Sess. 202 (1990).

Prior to 1997, the ozone NAAQS had focused on short-term concentrations measured over a one-hour averaging time. 36 Fed. Reg. 8187/3 (April 30, 1971), JA(O) 3540 (setting NAAQS at 0.08 ppm averaged over one hour); 44 Fed. Reg. 8220/3 (February 8, 1979), JA(O) 3498 (setting NAAQS at 0.12 ppm averaged over one hour). Subsequently, concern was raised by CASAC and others that "even in areas which do not repeatedly exceed the ozone standard, ozone concentrations can remain close to 0.12 ppm for several hours per day for extended periods of time in summer. There was concern based on recent controlled human exposure, epidemiology and toxicology studies, that such prolonged exposures could result in increased respiratory impairment." 58 Fed. Reg. 13018/2 (March 9, 1993), JA(O) 3459.

Several years after CASAC's observation, having compiled a revised criteria document addressing these and other studies, EPA noted that human experimental data documented health effects resulting from 6- to 8-hour exposures to ozone concentrations as low as 0.08 ppm:

> Based on a significant body of information available since the last review, there is now *clear evidence* from *human clinical studies* that O3 effects of concern are associated with the 6- to 8-hour exposures tested. . . . This includes evidence of the following statistically significant responses at 6- to 8-hour exposures to the *lowest concentration evaluated, 0.08 ppm O3*, at moderate exertion: lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation.

62 Fed. Reg. 38863-64, JA(O) 8-9 (emphasis added). *See also id.* 38872/1, JA(O) 17 ("the bulk of the human health effects evidence supporting a decision on an appropriate O3 standard is based on controlled human exposure studies that relate known O3 exposures directly to responses in individuals").

Those most at risk from these effects are people who are active outdoors – *e.g.*, "active children and outdoor workers who regularly engage in outdoor activities." *Id.* 38859/3, JA(O) 4. In contrast to the studies underlying the prior NAAQS, which measured effects based on heavy exertion, the newer studies showed health effects under moderate exertion – a matter of concern because "[m]oderate exertion levels are more frequently experienced by individuals than heavy exertion levels." *Id.*

In addition to outdoor exertion, other factors increasing risk of harm from ozone exposure include respiratory impairments such as asthma. *Id. Accord*, CD 9-26, JA(O) 1767 ("The magnitude of individual changes can become more important in persons with impaired respiratory systems (e.g., asthmatics) who already have reduced baseline lung function."). EPA heard vivid testimony concerning the effects of ozone on asthmatics:

> When I was four years old, I was playing outside on a really hot day and I started wheezing

and my lungs started tightening up. So I came in and told my mom.

We went to the doctor the next day and the doctor said I had asthma. The worst thing about having an asthma attack is that it almost feels like you are going to die because your lungs close up and it is really hard to breathe.

The last two summers have been really bad for me. On days when the ozone is bad, I can't even go outside to play.

IV-F-84a at 168-69, JA(O) 3394-95 (ten-year-old Bethany Myles of Chicago).

When there are ozone warnings, I can't be out of the air-conditioning. If I do go outside, I have an asthma attack. An asthma attack feels like I am suffocating. No one should have to feel this way.

Id. at 39, JA(O) 3389 (ten-year-old Jeff Damitz of Chicago). EPA estimated that twelve million Americans – one in twenty – are asthmatic. SP 39, JA(O) 1849.

Non-asthmatics likewise are at risk if they happen to be among those who are more sensitive to ozone: "[t]here is a large range of physiological responses among humans, with at least a 10-fold difference between the most and least responsive individuals." CD 9-4, JA(O) 1744. *See* McDonnell (1991), II-I-316, at 149, JA(O) 2775 (human clinical study at 0.08 ppm produced lung function decrements as high as 37.9%); RTC 81 ¶ 5, JA(O) 161 (in human clinical studies at 0.08 ppm, 10% of individuals had lung function decrement ≥20%). EPA heard testimony from these sensitive individuals as well:

We had at least 26 days this summer of "unhealthful" ground level ozone under the ME [Maine] standard of .08 ppm. That's a big part of our summer, a very big part. This ground level ozone is a real problem, a serious problem.

It's not just a statistical problem, either, because some standard was exceeded. I can feel it personally. I have exercised vigorously outside on "unhealthful" days and become physically sick – a funny nauseous feeling with a headache.

IV-F-102 at 1, JA(O) 3380 (Charles M. Sexton of South Portland, ME).

After considering the results of the studies, and the American Thoracic Society's criteria for defining which health effects should be considered adverse, EPA concluded that "responses of some sensitive individuals [to 0.08 ppm] *are sufficiently severe and extended in duration to be considered adverse.*" 62 Fed. Reg. 38864/1, JA(O) 9 (emphasis added).

In addition to the human experimental data, EPA also noted that "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O3 exposures, *including O3 concentrations below the level of the current standard.*" *Id.* (emphasis added). As the Criteria Document noted, these studies "provide *strong evidence* that ambient exposures to O3 can cause *significant exacerbations of pre-existing respiratory disease* in the general public at concentrations below 0.12 ppm O3." CD 7-171, JA(O) 1624 (emphasis added). EPA determined that "increased hospital admissions and emergency room visits . . . are clearly adverse to individuals." 62 Fed. Reg. 38864/2, JA(O) 9.

In short, the evidence before EPA showed that health effects of concern (including adverse health effects) were occurring at levels allowed by the previous NAAQS, and at longer averaging times (6-8 hours, not just one hour). CASAC concluded that a new, eight-hour NAAQS was

necessary: "It was . . . the consensus of the Panel that an 8-hour standard was more appropriate for a human health-based standard than a 1-hour standard." Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 2, JA(O) 237.

In acting on CASAC's consensus recommendation that an eight-hour NAAQS be set, EPA considered setting the level of the eight-hour standard at 0.09 ppm, which is the eight-hour level most comparable in protectiveness to the one-hour 0.12 ppm NAAQS. 61 Fed. Reg. 65725/2, JA(O) 51. Given the evidence documenting adverse health effects at levels allowed by the one-hour standard, EPA unsurprisingly rejected this option in favor of a more protective standard.

EPA presented the results of a risk assessment, which concluded that tens of thousands more members of the group of greatest concern – children who are active outdoors – would suffer respiratory impairment and symptoms at a 0.09 ppm NAAQS than at a 0.08 ppm NAAQS. 62 Fed. Reg. 38865/2-3, JA(O) 10 (as compared to a 0.08 ppm NAAQS, a 0.09 ppm NAAQS would subject 70,000 more children to lung function decrements ≥15%, 39,000 more children to decrements ≥20%, and 14,000 more children to moderate or severe pain on deep inspiration). These figures applied only to nine urban areas, *id.* 38868/1 ¶ 2, JA(O) 13, and thus underestimate the number of ozone-induced effects that would occur nationwide.

The assessment also concluded that in New York City alone, a 0.09 ppm NAAQS would result in 40 more excess hospital admissions of asthmatics per ozone season than a 0.08 standard. *Id.* 38868/1, JA(O) 13. Even for that one city, this figure is "indicative of a pyramid of much larger

numbers of related O3-induced effects, including respiratory-related hospital admissions among the general population, emergency and outpatient department visits, doctors visits, and asthma attacks and related increased use of medication that are important public health considerations." *Id.*

EPA also considered other scientifically documented effects of 6- to 8-hour exposure to 0.08 ppm, including "increased nonspecific bronchial responsiveness (related, for example, to aggravation of asthma), decreased pulmonary defense mechanisms (suggestive of increased susceptibility to respiratory infection), and indicators of pulmonary inflammation (related to potential aggravation of chronic bronchitis or long-term damage to the lungs)." *Id.* 38868/1-2, JA(O) 13.

After weighing the evidence, EPA opted for an eight-hour standard at 0.08 ppm, a level consistent with the recommendations of CASAC. Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 3, JA(O) 238 (of ten panel members who expressed views, three favored 0.08 ppm, one endorsed a range of 0.08-0.09 ppm, and two endorsed the range presented by EPA (i.e., 0.07-0.09 ppm)).

Proceedings Below. In the D.C. Circuit, industry and state petitioners challenged the new NAAQS on a number of grounds in petitions for review under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1). American Lung Association, the oldest voluntary health organization in the United States, intervened to oppose weakening of the new NAAQS.

The D.C. Circuit did not in any way question the validity of the science relied upon by EPA concerning either PM or ozone, and on the contrary found that EPA's

decision to set fine particle NAAQS "easily" satisfied the statutory standard. App. 55a. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." App. 55a-56a.

Nonetheless, the D.C. Circuit held that the Clean Air Act, and EPA's interpretation of it, violate the nondelegation doctrine. App. 14a. The court also sharply limited (or, according to industry respondents' and Ohio's interpretation of the court's decision, eliminated) EPA's authority to implement the new eight-hour ozone NAAQS. App. 34a, 37a-44a, 79a-82a.

SUMMARY OF THE ARGUMENT

Nondelegation. As demonstrated by numerous precedents of this Court upholding broader statutory delegations, the Clean Air Act's mandate for NAAQS that "protect the public health" with "an adequate margin of safety," § 109(b)(1), provides an ample "intelligible principle" to satisfy the nondelegation doctrine. Moreover, that mandate draws further meaning from the context of the Act (specifically, the fields of medicine, epidemiology, and other public health disciplines), from the legislative history, and from 1977 amendments establishing a uniform basis for health-based standard-setting. In addition, the D.C. Circuit itself has repeatedly conducted judicial review of NAAQS for two decades. It is unsustainable to contend on the one hand that the Act provides sufficient "law to apply" to enable such review, *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971),

and on the other that Congress has failed to supply an intelligible principle.

The D.C. Circuit's assertion that the nondelegation doctrine requires a "determinate criterion" is refuted by precedent of this Court repeatedly upholding delegations under thoroughly nondeterminate standards, as well as by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and other precedent of this Court recognizing that Congress may legitimately write ambiguous (*i.e.*, nondeterminate) statutes that require agencies to make policy choices.

Because the Clean Air Act plainly satisfies the nondelegation doctrine, the D.C. Circuit's constitutional inquiry should have stopped there – there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less a constitutionally based narrowing of that interpretation. This case is fundamentally different from *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*"), where a plurality undertook a narrowing interpretation of a far broader delegation that required EPA to balance health against other factors. Moreover, unlike in *Benzene*, where evidence of harm was lacking even at pollutant levels an order of magnitude higher than the standard set by the agency, here EPA has set both the fine particle and ozone NAAQS in the range in which compelling scientific evidence documents adverse health effects. There was no basis for the D.C. Circuit to offer an advisory opinion on whether EPA could constitutionally set NAAQS at levels lower than the ones chosen. Likewise, given that the nondelegation argument in this case was raised only by parties seeking *less* stringent NAAQS, there was no basis

for the D.C. Circuit to require that EPA mount a constitutional defense of its decision not to set *more* stringent NAAQS.

Ozone Implementation. The D.C. Circuit correctly held that the 1990 Amendments do not bar EPA from revising ozone NAAQS or issuing nonattainment designations under revised NAAQS. The court incorrectly held, however, that Subpart 2 of the Act governs implementation of the new ozone NAAQS. It is *Subpart 1* that expressly sets forth requirements for compliance with "*any* revised standard, *including a revision of any standard in effect on November 15, 1990.*" § 172(a)(1)(A) (emphasis added).

The Subpart 2 provisions relied on by the D.C. Circuit are based on the pre-existing ozone NAAQS, and therefore do not oust the Subpart 1 provisions governing classifications and attainment dates under the *new* NAAQS. First, for the numerous areas that violate the new NAAQS yet have a design value less than 0.121, the Subpart 2 classification table provides no classifications or attainment dates. Second, for areas that violate the new NAAQS and have a design value of 0.121 or greater, the Subpart 2 classifications and attainment dates cannot be applied to the new NAAQS without causing absurd results: specifically, attainment dates that *predate* the 1997 promulgation date of the new NAAQS.

With respect to control measures, the D.C. Circuit did not even point to any statutory provision that allegedly ousts the Subpart 1 requirements, and no such provision exists. Moreover, applying the Subpart 2 control measure provisions to the new NAAQS would produce absurd results – specifically, pollution control plan submission deadlines that *predate* the 1997 promulgation date of the new NAAQS.

Finally, according to industry respondents and Ohio, the D.C. Circuit went beyond simply holding that Subpart 2 governs the new ozone NAAQS – they read the D.C. Circuit's decision as precluding EPA from implementing the new NAAQS *at all, ever*. This reading reduces the Act to an absurdity, and ignores the Act's core public health purpose by allowing millions of Americans to continue being exposed to pollution levels that cause asthma attacks and other adverse health effects. Moreover, this reading conflicts with the D.C. Circuit's own interpretation of Subpart 2: it is untenable to advocate an interpretation of the Act that presupposes the existence of Subpart 2 classifications and attainment dates for the new NAAQS, while simultaneously denying that Subpart 2 imposes *any* date for attainment of that NAAQS.

ARGUMENT

This Court has recognized that the 1970 Clean Air Act, which enacted the § 109(b)(1) mandate to set NAAQS that "protect the public health" with "an adequate margin of safety," responded to "threats to human health [that] were regarded as urgent." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). *See also Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (under the pre-1970 Act, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so;" the response of the States was "disappointing," and brought "little progress;" "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970," which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution.").

Three decades after Congress took this urgent step, the promise of clean air embodied in the 1970 legislation remains unrealized. Persistent unhealthy levels of PM and ozone are the most important reason for that continuing failure. No other pollutant comes close to these in the number of deaths, illnesses, and other adverse effects caused.

For over ten years, the American Lung Association – along with many other concerned organizations and individuals, including many scientists, physicians, and public health professionals – has worked to combat this problem by advocating the adoption of more protective NAAQS. As the record of this proceeding abundantly documents, the pre-existing NAAQS are simply not adequate to the task of protecting public health. At pollution levels allowed by those NAAQS, large numbers of people are dying, being driven to the hospital, and suffering pain and discomfort – all for the simple act of breathing the air.

Compared with their predecessors, the fine particle and ozone NAAQS remanded by the D.C. Circuit represent a major step forward towards control of this pollution. Currently, many millions of people are exposed to harmful levels of PM and ozone pollution, yet live in areas where the pre-existing NAAQS for those pollutants are met. P. 4, *supra* (most studies finding adverse PM-related health effects were from eastern U.S., where PM concentrations meet the pre-existing NAAQS); 62 Fed. Reg. 38868/2, JA(O) 13 ("approximately 46 million more people, including approximately 13 million more children and 3 million more individuals with asthma, live in areas that would not attain a 0.08 ppm standard compared to a 0.09 ppm standard"); 61 Fed. Reg. 65725/2, JA(O) 51 (0.09 ppm is

the eight-hour level most equivalent to the pre-existing one-hour NAAQS).

EPA's new NAAQS will extend much-needed protection to these many people, as well as ensuring that clean-up activities in areas currently violating the pre-existing NAAQS will prevent more adverse health effects. The prospect is striking: the new NAAQS are expected to prevent thousands of deaths and hospital admissions each year, as well as tens of thousands of cases of respiratory and cardiopulmonary illness and millions of days of missed work and restricted activity. Pp. 2, 10, *supra*. The D.C. Circuit's decision will at best greatly delay and at worst outright prevent these public health benefits from being realized, and will condemn millions of Americans to continued exposure to harmful air pollution associated with premature death, hospital admissions, and other adverse health effects.

I. THE CLEAN AIR ACT, AND EPA'S INTERPRETATION OF THE ACT, PASS MUSTER UNDER THE NONDELEGATION DOCTRINE.

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy the Nondelegation Doctrine.

Recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," this Court has held that, "[s]o long as Congress 'shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (emphasis added). After overturning two statutes

over sixty years ago, the Court has since "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 517 U.S. 748, 771 (1996).

(1) The Language of the Act, Both Alone and Considered in Light of the Statutory Context and Legislative History, Establishes Intelligible Principles.

1970 Act. Contrary to the D.C. Circuit's conclusion, App. 5a (stating that "no[ ] [intelligible principle] is . . . apparent from the statute"), the Clean Air Act sets forth intelligible principles to guide EPA's implementation. The Act provides that primary NAAQS must be standards which, "allowing an adequate margin of safety, are requisite to protect the public health." § 109(b)(1). Given that "one cannot plausibly argue" that there is a nondelegation problem in a statute authorizing regulation of an "imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165 (1991), a nondelegation challenge to § 109(b)(1) is equally implausible. Indeed, this Court has upheld far broader standards in numerous cases, including statutes conferring authority to fix "fair and equitable" prices, to recover "excessive" profits, and even to regulate broadcast licensing in the "public interest." App. 59a-60a (Tatel, J., dissenting) (citing cases).

Moreover, the Act's "public health" standard takes further meaning from its context. *See Natl. Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (the statutory phrase "public interest, convenience, or necessity" in the Communications Act "is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . . ") (citation

omitted). There can be few if any fields of human endeavor that have a history longer than, or have arrived at a level of sophistication comparable to, the study and protection of human health. Thus the profession of medicine, and related public health disciplines such as epidemiology and toxicology, furnish a detailed context for § 109(b)(1)'s "public health" mandate. Indeed, this context is expressly linked by statute to EPA's standard-setting duties, through the requirements that standards be "based on" air quality criteria that "accurately reflect the latest scientific knowledge" concerning health effects, §§ 108(a)(2), 109(b)(1), and that EPA convene an expert "scientific review committee" and respond to its recommendations. §§ 109(d)(2), 307(d)(3).

Further constraining the delegation is the statutory requirement that EPA include a detailed statement of basis and purpose in the proposed rule (including an explanation for rejecting any recommendations of the scientific advisory committee), and another such statement in the final rule (including a response to significant public comments and new data, and an explanation of changes from the proposal). § 307(d)(3)-(6). *See Yakus v. United States*, 321 U.S. 414, 426 (1944) ("[t]he standards prescribed by the present Act, *with the aid of the 'statement of the considerations' required to be made by the Administrator*, are sufficiently definite and precise" to survive nondelegation challenge) (emphasis added).

In addition, though the statutory text by itself offers more than sufficient specificity to pass muster under this Court's nondelegation precedent, substantial additional guidance is provided by the legislative history. S. Rep. 1196, 91st Cong., 2d Sess. 10 (1970) (NAAQS must protect

"particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment;" in particular, NAAQS must ensure "an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups;" such a sample is "the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air"); *id.* (the "margin of safety" requirement is designed to provide "a reasonable degree of protection . . . against hazards which research has not yet identified").

1977 Amendments. Further congressional guidance defining the scope of the delegation is provided by a 1977 package of amendments addressing the "Basis of Administrative Standards," Pub. L. No. 95-95, § 401, 91 Stat. 790-91 (August 7, 1977), designed to establish "a standardized basis for future rulemaking to protect the public health." H.R. Rep. 294, 95th Cong., 1st Sess. 50 (1977) ("1977 House Report"). The impetus for these amendments was provided by *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), where the en banc D.C. Circuit upheld EPA regulations on leaded gasoline. Rejecting industry's argument that EPA was required to document "proof of actual harm" as a prerequisite to regulation, the D.C. Circuit upheld EPA's conclusion that the Act contemplates regulation where there is "a significant risk of harm." *Id.* 12-13. Noting the newness of many human alterations of the environment, the court found:

> Sometimes, of course, relatively certain proof of danger or harm from such modifications can be readily found. But, more commonly, "reasonable medical concerns" and theory long precede certainty. Yet the statutes – and common sense – demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Id. 25. *Accord, id.* ("Awaiting certainty will often allow for only reactive, not preventive, regulation."). Recognizing "the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist," *id.* 24, and "the established maxim that health-related legislation is liberally construed to achieve its purpose," *id.* 31, the D.C. Circuit upheld EPA's precautionary approach. Specifically addressing § 109, the court found that § 109's margin of safety requirement mandates that NAAQS "be preventive in nature." *Id.* 15.

The drafters of the 1977 Amendments indicated their intent to "support the views expressed" in *Ethyl*, and to "apply this interpretation to *all* other sections of the act relating to public health protection." 1977 House Report at 49 (emphasis added). *Accord, id.* 50 n.3 (emphasizing intent "to require application of these factors to standard-setting under *all* sections of the act") (emphasis added). Specifically, the drafters intended *inter alia* to

- "emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm)," and thus "to assure that regulatory action can effectively prevent harm before it occurs." *Id.* 51, 49.
- "emphasize the predominant value of protection of public health." *Id.* 49.
- "assure that the health of susceptible individuals, as well as healthy adults, will be encompassed in the term 'public health,' regardless of the section of the act under which the Administrator proceeds." *Id.* 50.

While the 1977 Amendments, like the 1970 Amendments, reaffirm the preeminent role of public health protection, the 1977 drafters also cautioned that EPA's standard-setting authority is "not . . . a license for 'crystal ball' speculation. The Administrator's judgment must, of course, remain subject to restraints of reasoned decision-making." *Id.* 51. Thus, the Administrator's power to assess risks " 'does not permit him to act on hunches or wild guesses; . . . his conclusions must be rationally justified.' " *Id.* 45 (citation omitted). *Accord*, *Ethyl*, 541 F.2d at 28.

Congress implemented these principles by enacting similar amendments to several provisions of the Act. Pub. L. No. 95-95, § 401, 91 Stat. 790-91 (August 7, 1977). These amendments are relevant to the setting of NAAQS, for two reasons. First, among the provisions amended was § 108(a)(1). *Id.* § 401(a). The effect of this amendment was to require listing of pollutants that *might* harm human health, even where actual proof of such harm is lacking. Because listing under § 108 requires regulation under § 109, *Ethyl*, 541 F.2d at 15 n.23, Congress's amendment of § 108 expressed its intent that NAAQS also protect against suspected and not merely demonstrated harm. Second, even apart from the change to § 108, the package of amendments in § 401 of the 1977 Amendments expressed Congress's intent to adopt a standardized basis for public-health-based rulemaking under the Act. *See* p. 21, *supra* (quoting 1977 House Report). Rulemaking under §§ 109(b)(1) and (d)(1) is designed to protect the public health, and thus is necessarily subject to this standard.[4]

---

[4] The absence of § 109 from the sections amended is for an obvious reason: § 109 had already been held by the D.C. Circuit to be precautionary, *see* p. 21, *supra* (citing *Ethyl*). By contrast, § 108 had been held to require a "firm threshold finding" of "known adverse effects or actual harm" before a pollutant could be listed for regulation, *Ethyl*, 541 F.2d at 14 & n.20, thereby necessitating amendment in order to adopt a precautionary approach.

Thus, the 1977 amendments provide further intelligible principles sufficient to defeat a nondelegation challenge.

(2) Because the Clean Air Act Provides Sufficient Specificity to Permit Judicial Review, It Necessarily Also Provides Sufficient Intelligible Principles to Satisfy the Nondelegation Doctrine.

This Court has held that if Congress has spoken with sufficient clarity to enable the courts to review agency implementing actions, then the nondelegation doctrine is necessarily satisfied. *Yakus*, 321 U.S. at 426 (delegation would be improper "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be *impossible* in a proper proceeding to ascertain whether the will of Congress has been obeyed") (emphasis added).

Indeed, any other conclusion would conflict with other precedent of this Court providing that review of agency action is unavailable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,' " *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted) – *i.e.*, where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v.*

Chaney, 470 U.S. 821, 830 (1985). It would be fundamentally contradictory to hold that Congress has provided sufficient "law to apply" to enable judicial review – and then to conclude that Congress has *failed* to provide an "intelligible principle" sufficient to enable such review.

The D.C. Circuit itself has reviewed EPA's decisions under § 109(b)(1) repeatedly, judging those decisions against congressional intent as set forth in the Act and legislative history. *Lead Industries Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962 (D.C. Cir. 1990); *American Lung Assn. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). As those opinions make clear, the D.C. Circuit was fully able to discern intelligible congressionally established principles sufficient to permit judicial review. *See, e.g., ALA*, 134 F.3d at 389 ("NAAQS must be set at a level at which there is an absence of adverse effect on [ ] sensitive individuals.") (internal quotations omitted); *Lead Industries*, 647 F.2d at 1152 & 1153 (same); *API*, 665 F.2d at 1186 ("[i]n setting margins of safety the Administrator need not regulate only the known dangers to health, but may 'err' on the side of overprotection"); *NRDC*, 902 F.2d at 972 (same).

Two additional, en banc D.C. Circuit decisions further confirm this conclusion. In *Ethyl*, the Court found meaning in § 109, and enunciated detailed principles on the setting of health-based clean air standards – principles that were ratified by Congress in 1977. *See* pp. 20-22, *supra*.

In *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"), a unanimous en banc D.C. Circuit – including both members of the

majority in the present case – construed and found meaning in CAA § 112's mandate to "provide[ ] an ample margin of safety to protect the public health." Expressly relying on the legislative history of § 109 (specifically, the 1970 Senate Report language quoted *supra* at 19-20), the court held that the margin of safety requirement "comports with the historical use of the term in engineering as 'a safety factor . . . meant to compensate for uncertainties and variabilities.' " 824 F.2d at 1152 (citation omitted). *See also id.* 1153, 1165 (further explaining the "margin of safety" requirement by reference to – *inter alia* – the "significant risk" standard adopted by the plurality in *Benzene*). While the D.C. Circuit's interpretation of § 112 differs in certain respects from its interpretation of § 109, *NRDC v. Administrator*, 902 F.2d at 973-74, the key point for nondelegation purposes is that the court was able to find meaning in a phrase ("margin of safety") that appears in § 109(b)(1). Accordingly, the unanimous en banc *Vinyl Chloride* decision further confirms that § 109(b)(1) establishes intelligible principles.

(3) The Clean Air Act Clearly Satisfies The Nondelegation Approaches Espoused by Chief Justice Rehnquist and Justice Scalia.

Not only does the Clean Air Act easily pass muster under the precedent of this Court – it also clearly satisfies the approaches advocated in *dissent* by Chief Justice Rehnquist and Justice Scalia. *Benzene*, 448 U.S. at 671 (Rehnquist, J.); *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 543 (1981) ("*Cotton Dust*") (Rehnquist, J.); *Mistretta*, 488 U.S. at 412 (Scalia, J.).

Chief Justice Rehnquist. In *Benzene* and *Cotton Dust*, then-Justice Rehnquist argued that the Occupational

Safety and Health Act violated the nondelegation doctrine, but based this conclusion on that statute's *feasibility* requirement: "the insertion into § 6(b)(5) of the words 'to the extent feasible' rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation." *Cotton Dust*, 452 U.S. at 545. By contrast, the bill as introduced contained no feasibility provision:

> Prior to the inclusion of the "feasibility" language, § 6(b)(5) simply required the Secretary to "set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health. . . . " . . . Had that statute been enacted, it would undoubtedly support the result the Court reaches in these cases, and it *would not have created an excessive delegation problem*. The Secretary of Labor would quite clearly have been authorized to set exposure standards without regard to any kind of cost-benefit analysis.

Id. (emphasis added). As will be shown by the briefing in No. 99-1426, the Clean Air Act – like the original OSHA bill that never became law – requires standards to be based on health "without regard to any kind of cost-benefit analysis." Accordingly, even under the strong version of the nondelegation doctrine espoused by Chief Justice Rehnquist, the Act clearly passes muster.

Justice Scalia. In *Mistretta*, Justice Scalia contended that the Sentencing Reform Act created an unconstitutional delegation. Though agreeing that the lenient "intelligible principle" test was met, 488 U.S. at 415-16, Justice Scalia contended that the Act had transgressed "the Constitution's *structural* restrictions that deter excessive delegation." *Id.* at 417 (emphasis added). Specifically, that

statute had delegated lawmaking authority to the Sentencing Commission, a body that "neither exercises any executive power on its own, nor is subject to the control of the President who does." *Id.* at 420.

Unlike the Sentencing Commission, EPA is not only subject to the control of the President (who appoints the Administrator), but also exercises direct executive power. In particular, once NAAQS are established EPA approves (or disapproves) state pollution control plans to attain the NAAQS, promulgates federal pollution control plans to attain the NAAQS, and enforces the plans thus approved and promulgated. CAA §§ 110(a) & (k), 110(c)(1), 113, 42 U.S.C. §§ 7410(a) & (k), 7410(c)(1), 7413. Moreover, EPA entertains and rules on petitions for abatement of interstate air pollution contributing to violations of the NAAQS, and enforces rulings issued pursuant to such petitions. CAA §§ 126, 113, 42 U.S.C. §§ 7426, 7413. Thus, the Clean Air Act satisfies the structural delegation approach espoused by Justice Scalia.

B. The Nondelegation Doctrine Does Not Require a "Determinate Criterion."

(1) A "Determinate Criterion" Test Is Unsupportable Given the Nondeterminate Language in the Constitution Itself, and Contravenes This Court's Precedent Repeatedly Upholding Nondeterminate Statutes.

The core of the D.C. Circuit's nondelegation ruling is the incorrect assertion that a delegation must be limited by a "determinate criterion for drawing lines" in order to pass constitutional muster. App. 6a. First, the Constitution itself contains nondeterminate provisions. *See, e.g.*,

Am. VIII ("[e]xcessive" bail and "excessive" fines); Am. II ("well regulated" militia); Am. IV ("unreasonable" searches and seizures, and warrants "particularly" describing the place or person to be searched or seized); Am. V ("due" process, and "just" compensation). Congress cannot be held to have acted unconstitutionally when it has spoken with the same kind of nondeterminate language used in the Constitution itself. *See Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (citing Eighth Amendment as grounds for rejecting a nondelegation doctrine challenge to the phrase "excessive profits" in the Renegotiation Act).

Second, the D.C. Circuit's test conflicts with the precedent of this Court, which requires only an "intelligible principle," not a determinate criterion – and which has repeatedly upheld delegations under thoroughly nondeterminate standards such as "fair and equitable" prices, "excessive" profits, and even the "public interest." *See* p. 18, *supra*. *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) ("The difficulty or impossibility of drawing a statutory *line* is one of the reasons for supplying merely a statutory *guide*.") (emphasis added); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145-46 (1941) (Congress is not constitutionally barred from "accept[ing] the administrative judgment as to the relative weights to be given to the[ ] [statutory] factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases"); *Lichter*, 334 U.S. at 785 ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the

congressional policy to infinitely variable conditions constitute the essence of the program."); *Yakus*, 321 U.S. at 425 ("it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date"); *United States v. Rock Royal Co-op*, 307 U.S. 533, 577 (1939) ("This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.").

Moreover, the standard adopted by the plurality in *Benzene* to avoid a possible nondelegation issue – "significant risk" – is likewise nondeterminate. *Benzene*, 448 U.S. at 655-56 (significant risk standard "is not a mathematical straitjacket," and "cannot be based solely on a resolution of the facts," but "will be based largely on policy considerations;" the agency "is free to use conservative assumptions in interpreting the data," "risking error on the side of overprotection rather than underprotection").

(2) A "Determinate Criterion" Test Contravenes *Chevron* and Other Precedent of this Court Recognizing that Congress May Legitimately Leave Policy Decisions to Be Made By Agencies.

Under this Court's precedent, the nondelegation doctrine does not preclude Congress from writing statutes that allow an agency "to exercise judgment on matters of policy." *Mistretta*, 488 U.S. at 378. For example, statutes may be worded in sufficiently broad terms to allow more than one possible interpretation, thereby allowing an

agency to exercise policy judgment to decide which interpretation should be adopted. This principle is illustrated by *Cotton Dust*, where concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine*. After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added). The D.C. Circuit's demand for a "determinate criterion" squarely conflicts with *Cotton Dust*'s recognition that Congress may write nondeterminate statutes that are susceptible to conflicting interpretations.

The principle recognized in *Cotton Dust* subsequently found expression in the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* Step Two, which applies where Congress has "delegat[ed]" to an agency authority to interpret a statute, the reviewing court must uphold the agency interpretation if it is "reasonable." *Id.* 843-44. *Chevron* Step Two necessarily presupposes that Congress may lawfully write statutes that are ambiguous and therefore subject to differing interpretations – indeed, diametrically opposing ones. *Id.* 863 ("The fact that the agency has from

time to time changed its interpretation of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). Indeed, *Chevron* expressly acknowledged that it is proper for Congress to punt policy decisions to agencies, rather than resolving them itself. *Id.* 865-66 (administrative agency can properly "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left to be resolved by the agency* charged with the administration of the statute") (emphasis added). The D.C. Circuit's "determinate criterion" test would undermine *Chevron* by holding that ambiguous statutes raise constitutional problems – thus transforming routine *Chevron* Step Two statutory review into *constitutionally* based nondelegation doctrine review. *See* App. 76a.

(3) *Schechter* Refutes a "Determinate Criterion" Test.

In an attempt to support its holding, the D.C. Circuit misquoted *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), for the proposition that where standards affect the whole economy, Congress must craft a "more precise" delegation. App. 12a (allegedly quoting *Schechter*). This purported standard appears nowhere in *Schechter*, and in any event offers no support for a "determinate criterion" test. Far from demanding such a criterion, *Schechter* took pains not to question the validity of the Federal Trade Commission Act's multi-industry proscription of "unfair methods of competition," even though that standard was decidedly *non*determinate. *Id.* at 532-33 (the FTCA standard "does not admit of precise definition," but rather its contours are "to be determined

in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest").

C. Because Congress Prescribed Intelligible Principles, the Nondelegation Doctrine Provides No Basis for a Narrowing Construction of the Act.

(1) Requiring EPA to Narrow Its Interpretation of the Act Is Unwarranted in Light of the Act's Clear Constitutionality, Will Not Serve the Purpose of the Nondelegation Doctrine, and Contravenes Precedent of this Court.

The D.C. Circuit not only held that the Act offers no intelligible principle, but also proceeded to strike down EPA's interpretation of the Act on constitutional grounds. Because the Clean Air Act offers an intelligible principle, however, the D.C. Circuit's constitutional inquiry should have stopped there – there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less to require a constitutionally based narrowing of that interpretation. *Mistretta*, 488 U.S. at 373 n.7 (recent application of nondelegation doctrine has been principally limited "to giving narrow constructions to statutory delegations *that might otherwise be thought to be unconstitutional*") (emphasis added).

Moreover, the D.C. Circuit's novel constitutional requirement that a narrowing interpretation be adopted *by the implementing agency* will do nothing to serve the purpose of the nondelegation doctrine (which is designed to preserve *Congress's* constitutionally conferred legislative authority, U.S. Const., Art. I, § 1), and in any event is flatly contrary to precedent of this Court. *American Power*

& Light Co. v. SEC, 329 U.S. 90, 106 (1946) (nondelegation doctrine does not require "that the legislative standards be translated by the [agency] into formal and detailed rules of thumb prior to their application to a particular case. If th[e] agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.").

(2) The Present Case Differs Fundamentally from Those Where Narrowing Constructions Have Been Undertaken.

The two decisions cited by *Mistretta* as having adopted narrowing constructions (488 U.S. at 373 n.7) both differ fundamentally from the present case. First, *Natl. Cable Television Assn. v. United States*, 415 U.S. 336 (1974), involved an agency usurpation of Congress's power of taxation, *id.* at 341 (it would be "a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power"), and a far more sweeping statutory delegation than is at issue here. *Id.* at 337 (statute required fees to be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*") (emphasis added).

Second, *Benzene* presented views on the nondelegation doctrine that did not even reflect the position of a majority of the Court,[5] and construed a statute that

---

[5] *See Benzene*, 448 U.S. at 717 n.30 (Marshall, J., joined by three other Justices, found that the statute posed no nondelegation problem), 664 n.1 (Powell, J., "express[ed] no view" on the nondelegation issue).

delegated far more broadly than the Clean Air Act's NAAQS provisions. *See* p. 26, *supra*. In addition, the factual context of this case differs fundamentally from that of *Benzene*. There, OSHA had set a benzene standard at 1 ppm, though evidence of harm was lacking even at levels an order of magnitude higher:

> OSHA acknowledged that there was no empirical evidence to support the conclusion that there was any risk whatsoever of deaths due to exposures *at 10 ppm*. What OSHA relied upon was a *theory* that, because leukemia deaths had occurred at much higher exposures, some (although fewer) were also likely to occur at relatively low exposures. The Court of Appeals specifically held that its conclusion that the number was "likely" to be appreciable was unsupported by the record.

Benzene, 448 U.S. at 652 n.60 (emphasis added). By contrast, EPA based the fine particle NAAQS on numerous scientific studies, whose validity was accepted by the D.C. Circuit, App. 55a-56a, showing a statistically significant relationship between fine particle concentrations and death and illness (including hospital admissions) at PM2.5 long-term mean daily concentrations of 16 to 21 µg/m3. 62 Fed. Reg. 38676/1, JA(PM) 26; SP E-8 to E-10, JA(PM) 2224-28. EPA set the annual standard, not orders of magnitude below this range, but just below its lower end: at 15 µg/m3. 62 Fed. Reg. 38676/2, JA(PM) 26.[6] EPA

---

[6] Indeed, the 15 µg/m3 annual standard is well *above* the lower limit of long-term mean daily concentrations (11 µg/m3) found to be positively associated with mortality at "nearly" statistically significant levels. 62 Fed. Reg. 38676/1, JA(PM) 26. *See Ethyl*, 541 F.2d at 28 n.58 ("Agencies are not limited to scientific fact, to 95% certainties.").

set the 24-hour standard at 65 µg/m3, above the 98th percentile of 24-hour concentrations in all but one of the studies documenting associations between PM2.5 and mortality. Memorandum of 9/30/96 from Patricia Koman, JA(PM) 3508. Likewise, the new ozone NAAQS is based on scientific studies, not questioned by the D.C. Circuit, documenting adverse health effects *at* the level of the new NAAQS itself. *See* pp. 6-7, 9, *supra*.

In short, EPA's fine particle and ozone NAAQS are based not on theories or extrapolation, but on evidence of death and illness in the range in which those standards were set. Thus, this case does not present a situation where EPA has attempted to set NAAQS at zero, App. 13a (speculating that EPA's interpretation might allow the agency to set NAAQS at zero), or (as in *Benzene*) substantially below the level where adverse health effects are documented. The D.C. Circuit had no basis to offer an advisory opinion on the constitutionality of such hypothetical NAAQS. U.S. Const., Art. III, § 2 (judicial power applies to "[c]ases" and "[c]ontroversies"). Likewise, the D.C. Circuit had no basis for requiring EPA to mount a constitutional defense of its decision "not to set a standard at a *lower* level" than the levels chosen. App. 10a (emphasis added). The nondelegation argument in this case was raised only by parties seeking *less* stringent NAAQS.

Here, the D.C. Circuit did not even claim that EPA had set the NAAQS below the levels at which the scientific evidence documented adverse health effects. Instead of focusing on what EPA *did*, the court speculated on what the agency's statutory interpretation would allegedly *allow* the agency to do in some future proceeding: "EPA's formulation of its policy judgment leaves it

free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." App. 13a. But EPA asserted no such broad discretion, and even if it had, that assertion would raise, not a *constitutional* issue, but a *statutory* one – *i.e.*, whether the agency's interpretation passes muster under *Chevron* as a valid interpretation of the Act. In light of the Act's express public health mandate, and Congress's intent to prevent adverse effects on sensitive individuals, *see* pp. 18-22, *supra*, there is no colorable argument that the Act would allow concentrations remotely approaching London's Killer Fog – or even at the level of the prior, demonstrably inadequate NAAQS. Moreover, under the Act EPA would not be free to set NAAQS at zero based on "hunches or wild guesses," but only if such a level could be "rationally justified." *See* p. 22, *supra*. Such a fact pattern is not presented in this case, and in any event the D.C. Circuit erred in suggesting that it would present a nondelegation problem. *Benzene*, 448 U.S. at 677 (Rehnquist, J., dissenting) (the original OSHA bill – which in then-Justice Rehnquist's view posed no nondelegation problem – "would have required the Secretary, in regulating toxic substances, to set the permissible level of exposure at a safe level or, if no safe level was known, at *zero*") (emphasis added). *See also* App. 93a (Silberman, J., dissenting) (the nondelegation doctrine addresses "the scope of the [agency's] discretion," not "the regulatory consequences of [the agency's] interpretation of the statute").

II. THE D.C. CIRCUIT'S RULING CONCERNING IMPLEMENTATION OF THE REVISED OZONE NAAQS CONTRAVENES THE ACT.

Once NAAQS are set, the Act requires that areas where air quality violates the NAAQS be designated as nonattainment areas, and that specified steps be taken to bring those areas into attainment. The Act prescribes generic provisions concerning nonattainment areas in Subpart 1 of Part D (§§ 171-179B, 42 U.S.C. §§ 7501-7509a), supplemented by pollutant-specific provisions in Subparts 2-5 (§§ 181-192, 42 U.S.C. §§ 7511-7514a). The ozone-specific program in Subpart 2 (§§ 181-185B, 42 U.S.C. §§ 7511-7511f) is based on the pre-existing ozone NAAQS (which was set at 0.12 parts per million, averaged over one hour), App. 32a, while Subpart 1 applies generically to any NAAQS (including any revised NAAQS). 172(a)(1)(A).

In a ruling on which no one has sought certiorari, the D.C. Circuit correctly held that the ozone-specific program in Subpart 2 does not preclude EPA either from promulgating a revised ozone NAAQS, or from issuing nonattainment area designations under that NAAQS. App. 34a-37a. The court incorrectly held, however, that "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." App. 34a. Because this reading contravenes the plain meaning of the Act and produces absurd results, application of Subpart 1 to nonattainment areas under the new ozone NAAQS should have been upheld under *Chevron* Step One, or at a very minimum, as a reasonable interpretation under *Chevron* Step Two.

Moreover, as interpreted by industry respondents and Ohio, the D.C. Circuit's ruling does not simply require EPA to implement the new standard through a different statutory tool (Subpart 2 instead of Subpart 1). Rather, industry respondents and Ohio read the D.C. Circuit's decision as precluding EPA from implementing the new standard *at all, ever*. Appalachian Power Rsp. to Cert. Petitions at 28 ("the 1990 Amendments to the Act 'must preclude the EPA from requiring areas to comply . . . *with a more stringent ozone NAAQS*') (emphasis added by Appalachian Power) (quoting App. 40a). *Accord, id.* 9, Ohio Rsp. at 2. This reading contravenes the Act, reduces the statutorily mandated NAAQS review process to a pointless exercise, and leaves large numbers of Americans to continue suffering asthma attacks and other adverse health effects that would be prevented by the new NAAQS.

A. The Subpart 1 Classification and Attainment Date Provisions Apply to the New Ozone NAAQS.

The D.C. Circuit's holding that the classifications and attainment dates of Subpart 2 apply to the new eight-hour NAAQS contravenes the plain language of the Act. By their express terms, the classification provisions of Subpart 1 apply to "*any* revised standard, *including a revision of any standard in effect on November 15, 1990,*" § 172(a)(1)(A) (emphasis added), and the attainment date provisions track that applicability. *Id.* (providing that classification under § 172(a)(1) is *inter alia* "for the purpose of applying an attainment date pursuant to paragraph (2)" – *i.e.*, pursuant to § 172(a)(2)). The D.C.

Circuit's attempts to avoid this conclusion will not withstand scrutiny.

The D.C. Circuit asserted that the Subpart 1 classification and attainment date provisions are ousted by §§ 172(a)(1)(C) and (a)(2)(D), which provide that the § 172(a) classifications and attainment dates do not apply to nonattainment areas for which classifications and attainment dates "are specifically provided under other provisions of this part." The D.C. Circuit found that these ouster provisions apply to the new eight-hour NAAQS, basing this finding on the court's assertion that § 181(a)(1) provides classifications and attainment dates for all ozone nonattainment areas. App. 37a-38a. This conclusion flies in the face of the plain language of the Act, with respect both to areas with a design value less than 0.121 and areas with a design value of 0.121 or greater.

1. Areas violating the new NAAQS, with design value less than 0.121. For areas with a design value less than 0.121, § 181(a)(1) specifies no classifications or attainment dates. Specifically, the table set forth in § 181(a)(1) provides classifications and attainment dates only for areas with a design value ≥0.121 – a level roughly approximating the level of the pre-existing one-hour NAAQS. App. 32a-33a. Thus, § 181(a)(1) offers no classifications or attainment dates for the numerous areas where air quality meets the pre-existing one-hour NAAQS, yet violates the new eight-hour NAAQS. As Judge Tatel observed, "it is . . . difficult to see how Subpart 2 can 'specifically provide[ ]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1." App. 84a.

Indeed, a recent D.C. Circuit decision holds that § 181(a)(1) does not set forth classifications or attainment dates even for all nonattainment areas under the pre-existing one-hour standard. *American Petroleum Inst. v. USEPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that "sub-marginal" areas – *i.e.*, areas that are in nonattainment of the one-hour standard but have a design value <0.121 – are not covered by Table 1 of § 181(a)(1); Table 1 and nonattainment status "overlap but are distinct"). The *API* decision confirms an observation made by the D.C. Circuit here. App. 36a ("not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher"). These statements undermine the D.C. Circuit's assertion that "Subpart 2 specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." App. 38a (emphasis added).

2. Areas violating the new NAAQS, with design value ≥0.121. For areas with a design value greater than or equal to 0.121, § 181(a)(1) provides classifications and attainment dates – but only for the pre-existing one-hour NAAQS, not for the new eight-hour NAAQS. Applying the § 181(a)(1) classifications and attainment dates to the new eight-hour NAAQS would produce absurd results – specifically, many areas would be assigned attainment dates *that predate the July 1997 promulgation of the new NAAQS*. For example, areas classified as marginal under the new NAAQS would be required to attain by November 15, 1993, and areas classified as moderate would be required to attain by November 15, 1996. 181(a)(1) (table 1). Thus, though the D.C. Circuit expressed concern about the attainment dates associated with EPA's interpretation,

App. 40a-41a (expressing concern that under EPA's interpretation, some areas might have to attain the new eight-hour NAAQS before expiration of the Subpart 2 deadlines for attaining the pre-existing one-hour NAAQS), it is *the D.C. Circuit's own interpretation* that produces anomalous attainment dates. Stated simply, an interpretation resulting in attainment deadlines that predate the very existence of the corresponding NAAQS cannot possibly be a valid reading of the Act. Tellingly, the D.C. Circuit never confronted, much less offered a response to, this absurd implication of its holding.[7]

---

[7] The Act does provide a mechanism for extending attainment deadlines in the event that areas are newly designated to nonattainment for ozone after enactment of the 1990 Amendments, § 181(b)(1), but that provision is inapplicable to designations under the new ozone standard: § 181(b)(1) applies only to areas designated nonattainment "under section 7407(d)*(3)*." (Emphasis added.) As the D.C. Circuit recognized, however, nonattainment area designations under the new ozone NAAQS will be made pursuant to § 107(d)*(1)*, 42 U.S.C. § 7407(d)*(1)*. App. 36a. Thus, the anomaly caused by the D.C. Circuit's reading remains.

Moreover, § 181(b)(1) applies only to areas that had been "designated attainment or unclassifiable" during the round of designations (made pursuant to § 107(d)(4)) that followed shortly after enactment of the 1990 amendments. App. 42a. Thus, even apart from the insurmountable problem noted in the previous paragraph, the extension authority of § 181(b)(1) would not apply to the numerous areas that were designated *non*attainment in the post-1990 § 107(d)(4) designations – among which are numerous metropolitan areas, including virtually the entire eastern seaboard from Northern Virginia through Connecticut, as well as Chicago, Houston, and Los Angeles, among others. 40 C.F.R. §§ 81.300 *et seq.*

B. The Subpart 1 Control Measure Provisions Apply to the New Ozone NAAQS.

The D.C. Circuit likewise erred by ruling (App. 34a) that the new eight-hour NAAQS must be implemented only in accordance with the "control measures" of Subpart 2. Indeed, the court did not even point to a statutory provision that allegedly ousted the Subpart 1 provisions concerning control measures.

No such provision exists. Section 172(b) requires states to submit, no later than "3 years from the date of the nonattainment designation," pollution control plans implementing new NAAQS – and § 172(b) contains no ouster provision comparable to § 172(a)(1)(C) or (a)(2)(D). Nor is such an ouster provision contained in § 172(c), which sets forth nine specific requirements that a control plan must meet – including the requirement that the plan "provide for attainment of the national primary ambient air quality standards." § 172(c)(1). *See also* H.R. Rep. 490, 101st Cong., 2d Sess. 223 (1990) ("1990 House Report") (§ 172(c) "establishes requirements for *all* nonattainment area plans, *including those for ozone* . . . nonattainment areas") (emphasis added).

Moreover, the D.C. Circuit's interpretation concerning control measures leads to absurd results that simply compound the unworkability of the court's interpretation concerning classifications and attainment dates. Not only would the D.C. Circuit's ruling result in areas being required to attain the new NAAQS before that NAAQS was even promulgated, it would result in pollution control plan submission deadlines falling due before that promulgation date as well.

Under the D.C. Circuit's interpretation concerning classifications and attainment dates, areas with a design

value ≥0.121 would be classified as Marginal, Moderate, Serious, Severe or Extreme pursuant to § 181(a)(1) Table 1, and would be assigned attainment dates from the table. Under the D.C. Circuit's interpretation concerning control measures, areas would then be subject to the Subpart 2 control measure requirements corresponding to their classification.

In particular, under the D.C. Circuit's reading all areas designated Moderate, Serious, Severe or Extreme must submit control plans *"[b]y no later than 3 years after November 15, 1990"* that "provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary *to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter."* § 182(b)(1)(A)(i), 42 U.S.C. § 7511a(b)(1)(A)(i) (emphasis added).[8] Likewise, *"[w]ithin 4 years after November 15, 1990,"* all areas designated Serious, Severe or Extreme must submit "[a] demonstration that the plan, as revised, will provide for *attainment of the ozone national ambient air quality standard by the applicable attainment date."* § 182(c)(2)(A) (emphasis added).[9] In short, the D.C. Circuit's interpretation will result in pollution control plans implementing the new NAAQS being deemed to have been due *before* the NAAQS was even promulgated.[10]

---

[8] This requirement, applicable on its face to Moderate areas, is also extended to Serious, Severe and Extreme areas by § 182(c), (d) and (e).

[9] This requirement, applicable on its face to Serious areas, is also extended to Severe and Extreme areas by § 182(d) and (e).

[10] The Act does provide a mechanism for extending control plan submission deadlines in the event that areas are newly designated to nonattainment for ozone after enactment of the

Thus, as soon as areas are designated nonattainment under the new NAAQS, they will be many years out of compliance with the Subpart 2 control plan submission deadlines – and will by virtue of that noncompliance face loss of highway funds, stricter requirements for siting of new industry, and imposition of a federal pollution control plan, unless their noncompliance is corrected within eighteen months to two years after EPA makes a finding of delinquency. §§ 179, 110(c)(1), 42 U.S.C. §§ 7509, 7410(c)(1). This absurd reading cannot possibly be a valid interpretation of the Act.

C. Industry's and Ohio's Interpretation of the D.C. Circuit's Decision Simply Compounds the Unlawfulness of that Decision.

Industry respondents and Ohio read the D.C. Circuit's decision as precluding EPA from requiring compliance with the new ozone NAAQS *at all, ever*. *See* p. 38, *supra*. That drastic reading conflicts with the Act – indeed, with the D.C. Circuit's *own interpretation* of the Act – and produces results that are absurd and in conflict with the Act's core public health purpose.

1990 Amendments, § 181(b)(1), but for reasons stated *supra* at 41 n.7, that provision is inapplicable to designations under the new ozone standard.

(1) The Assertion that Areas Need *Never* Attain the New NAAQS Conflicts With the Act, and Even With the D.C. Circuit's Own Erroneous Interpretation of the Act.

Industry and Ohio cannot have it both ways: they cannot advocate an interpretation of the Act that presupposes the existence of Subpart 2 classifications and attainment dates for the new NAAQS, while simultaneously denying that Subpart 2 imposes *any* date for attainment of that NAAQS.

Stated simply, either Subpart 2 imposes classifications and attainment dates under the new NAAQS, or it does not. If Subpart 2 imposes such classifications and dates, those classifications and dates can only be the ones in § 181(a)(1) Table 1 – and those Table 1 attainment dates include dates that *predate* promulgation of the 1997 NAAQS. *See* p. 40, *supra*.

If on the other hand Subpart 2 imposes *no* classifications and attainment dates for the new NAAQS, then the ouster provisions of § 172(a)(1)(C) and (a)(2)(D) do not apply, and there is no bar to EPA applying the Subpart 1 classification and attainment date provisions – and of course, the Subpart 1 control measure provisions, which have no ouster clause in any event.

(2) The Assertion that Areas Need *Never* Attain the New NAAQS Reduces the Statutorily Mandated Revision of NAAQS to a Pointless Exercise, and Contravenes the Act's Core Public Health Purpose.

The assertion that areas need *never* comply with the new NAAQS reduces the Act to an absurdity. The D.C. Circuit correctly concluded that the 1990 Amendments

left unchanged EPA's *statutory* obligation to revise NAAQS as appropriate and make nonattainment designations pursuant to revised NAAQS. App. 34a-37a. To then conclude that revised NAAQS cannot be implemented would render the statutory revision and nonattainment designation process futile. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970) (where statute required reappraisal of a prior program, Court rejected an interpretation that "would render the . . . reappraisal a futile, hollow, and, indeed, a deceptive gesture"); *United States v. Wilson*, 503 U.S. 329, 334 (1992) ("absurd results are to be avoided"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("avoid unreasonable results whenever possible").

Moreover, the assertion that the new NAAQS need never be attained is fundamentally at odds with the special – and central – role of the public-health-based NAAQS process in the Clean Air Act. *See* pp. 18-22, *supra*. Here EPA has concluded that, even at ozone concentrations meeting the previous NAAQS, extensive adverse health effects are occurring – including hospitalization for respiratory ailments, reductions in lung function, and respiratory symptoms. Pp. 6-9, *supra*. To rule unenforceable a standard designed to protect against those effects is to abandon the affected individuals to their fate. It would be difficult to envision a result more diametrically opposed to the core intent of the Act.

D. As Amended on Rehearing, the D.C. Circuit's Decision Still Contravenes the Act.

Based on changes made by the D.C. Circuit on rehearing, App. 80a-81a, Judge Tatel concluded that the revised opinion "leaves open the possibility that the new ozone standard can be implemented *in areas that have*

attained the old standard." App. 89a (emphasis added). This limitation on implementation of the new standard contravenes the Act.

The approach proposed by Judge Tatel does correctly recognize that Subpart 2 provides no classifications or attainment dates for areas that violate the new NAAQS, yet have a design value less than 0.121. App. 84a-85a. Absent classifications and attainment dates under Subpart 2, "nothing precludes enforcement of the new standard under Subpart 1." App. 88a.

However, Judge Tatel's proposed approach would leave undisturbed the D.C. Circuit's incorrect ruling that Subpart 2 *does* set forth classifications and attainment dates under the new NAAQS for areas with a design value of *0.121 or higher*. Judge Tatel asserted – as did the original panel opinion – that this ruling implements Congress's alleged intent to "extend[ ] the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS." App. 83a (quoting panel). This argument is meritless.

First, far from allowing *longer* attainment deadlines for areas with a design value of 0.121 or higher, application of Subpart 2 to the new NAAQS would have exactly the opposite effect: it would for many areas produce attainment dates that *predate* promulgation of that NAAQS. *See* p. 40, *supra*. That absurd interpretation cannot be a valid reading of the Act.

Second, the D.C. Circuit fundamentally mischaracterized the program enacted in 1990. That program did not grant polluted areas an *entitlement* to any specific amount of time to attain even the one-hour NAAQS (much less the eight-hour NAAQS). Rather, with respect to the one-hour NAAQS, Congress expressly required attainment *"as expeditiously as practicable* but not later

than the [applicable attainment] date." § 181(a)(1) (emphasis added). *Accord*, 1990 House Report at 229 (Subpart 2 attainment dates "are *outside* limits intended to provide a reasonable target for a large class of nonattainment areas. In the case of each individual nonattainment area, the bill continues the responsibility to attain *as expeditiously as practicable*. The objective is to achieve the standard *as early as possible* with effective and enforceable measures and without gaming by the States, industry, and others.") (emphasis added); S. Rep. 228, 101st Cong., 1st Sess. 37 (1989) (the § 181 attainment dates are *"final* deadlines;" "The generic requirement in section 172(a) for attainment *as expeditiously as practicable*, of course, applies to attainment of the ozone standard. For example, if a severe area can attain the standard in *less* than fifteen years, it *must* do so.") (emphasis added).

At the same time when it wrote the Subpart 2 provisions requiring attainment of the *existing* ozone standard as expeditiously as practicable, Congress carefully crafted a Subpart 1 program designed *inter alia* to attain "any *revised* standard, including a revision of any standard in effect on November 15, 1990." § 172(a)(1)(A) (emphasis added). This extensively revised Subpart 1 program includes provisions for classifications, attainment dates (conditioned by an obligation to attain "as expeditiously as practicable," 172(a)(2)(A)), and other detailed requirements. §§ 171-179B. Because the 1990 Amendments extensively rewrote Subpart 1, the D.C. Circuit was simply mistaken in asserting that the 1990 Amendments carried forward the pre-existing Subpart 1 provisions unchanged. *See* App. 32a (asserting erroneously that Congress simply

"redesignat[ed] the original [pre-1990-Amendment nonattainment] provisions as Subpart 1"). Far from being some pre-existing relic that Congress intended to shunt aside, Subpart 1 reflects the carefully considered contemporaneous intent of the *same* Congress that enacted Subpart 2. That Congress's express intent (embodied in § 172(a)(1)(A)) to apply Subpart 1 to revised NAAQS must be respected.

Thus, for areas that are in violation of both the old and new standards, the Act requires that they proceed simultaneously towards compliance with Subpart 2 (with respect to the old standard) and Subpart 1 (with respect to the new standard). There is nothing unusual in requiring areas to move simultaneously towards achievement of more than one NAAQS: as demonstrated by existing NAAQS for pollutants other than ozone, a single pollutant can be subject to more than one primary NAAQS. 40 C.F.R. Part 50. Such simultaneous implementation is not only required by the express terms of Subparts 1 and 2, but also avoids the multi-year delays in achievement of clean air that would be produced by Judge Tatel's sequential approach. Millions of Americans living in areas that are violating both the old and new standards have been waiting for decades to breathe air that protects their health. As the record in EPA's ozone rulemaking abundantly demonstrates, attainment of the old standard will still leave them suffering numerous ozone-induced health impairments. For the sake of their health, it is important that planning to attain the new, more protective ozone standard start now, and not be held in abeyance until years in the future, when the old standard has been attained.

Finally, a third reason why Judge Tatel's approach is unlawful is that (at least with respect to areas with a

design value of 0.121 or higher) it does nothing to remedy the D.C. Circuit's erroneous ruling concerning control measures. *See* pp. 42-44, *supra*. That ruling (App. 34a) was not amended on rehearing.

CONCLUSION

For the foregoing reasons, the Court should hold that the Clean Air Act provisions governing NAAQS, and EPA's interpretation of those provisions, do not represent an unconstitutional delegation, and should further hold that the Subpart 1 classifications, attainment dates, and control measures apply to all nonattainment areas under the 1997 ozone NAAQS. (ALA takes no position concerning EPA's Question #2.)

DATED: July 19, 2000.

Respectfully submitted,

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of record for American Lung Association

(19)

No. 99-1257

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

IN THE
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Respondents.

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MAINE, MARYLAND, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN SUPPORT OF PETITIONERS

ELIOT SPITZER
Attorney General of the
State of New York State
PREETA D. BANSAL
Solicitor General
(Counsel of record)
DANIEL X. SMIRLOCK
Deputy Solicitor General
The Capitol
Albany, NY 12224
(212) 416-8479
Attorneys for the State of New York

LISA FEINER
J. JARED SNYDER
Assistant Attorneys General
Environmental Protection
Bureau

(Counsel continued on inside cover)

BILL LOCKYER
Attorney General of
California
1300 I Street
Sacramento, CA 95814

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford, CT 06106

ANDREW KETTERER
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland
200 St. Paul Place
Baltimore, MD 21202

PHILIP McLAUGHLIN
Attorney General of New
Hampshire
33 Capitol Street
Concord, NH 03301-6397

D. MICHAEL FISHER
Attorney General
Commonwealth of
Pennsylvania
16th Fl. - Strawberry Square
Harrisburg, PA 17120

SHELDON WHITEHOUSE
Attorney General of Rhode
Island
State House Station #6
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier, VT 05609-1001

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of the *Amici* 1

Summary of Argument 4

Argument 5

Point I 5

Point II 14

Conclusion 22

TABLE OF AUTHORITIES

CASES **PAGE**

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 20

American Trucking Associations, Inc. v. United States Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir.), *rehearing en banc denied*, 195 F.3d 4 (D.C. Cir. 1999) ..... *passim*

American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1983) 12, 13

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 20

Federal Trade Commission v. Mandel Brothers, Inc., 359 U.S. 385 (1959) 20

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 21

Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991) 20

PAGE

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) ..... *passim*

Lead Industries Association v. United States Environmental Protection Agency, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980)..... 8-9

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 20

Mistretta v. United States, 488 U.S. 361 (1989) 7

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 21

United States v. Marine Shale Processors, 81 F.3d 1329 (5th Cir. 1996), *cert denied*, 519 U.S. 1055 (1997) 2

United States v. Haggar Apparel Co., 526 U.S. 380 (1999) 21

Yakus v. United States, 321 U.S. 414 (1944) 9

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, MAINE, MARYLAND, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND, AND VERMONT IN SUPPORT OF PETITIONERS

The States of New York, California, Connecticut, Maine, Maryland, New Hampshire, Pennsylvania, Rhode Island, and Vermont respectfully submit this brief as *amici curiae* in support of the petitioners United States Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA.

The *amici* States seek reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *rehearing en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), which overturned EPA's revised National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter. These NAAQS were promulgated pursuant to section 109 of the Clean Air Act (the Act), 42 U.S.C. § 7409, which requires that NAAQS be set at a level "requisite to protect the public health with an adequate margin of safety."

INTEREST OF THE *AMICI*

Residents of the *amici* states suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and fine particulate matter in the ambient air. EPA promulgated the revised NAAQS for these pollutants after an

extensive study of the latest scientific knowledge revealed that the existing NAAQS for ozone and particulate matter did not sufficiently protect the public from adverse health effects and thus did not satisfy section 109 of the Act.

The scientific record of the rulemaking at issue establishes that the revised standards will have a profoundly beneficial impact on public health, eliminating thousands of premature deaths attributable to air pollution each year, preventing tens of thousands of instances of respiratory illness attributable to exposure to ozone and fine particulate matter, and improving the quality of life of the children and adults who suffer from asthma. As *parens patriae*, the *amici* States have a paramount interest in protecting their residents from the debilitating and potentially life-threatening effects of asthma and other respiratory illnesses.

The States, however, face significant obstacles in attempting to protect their residents because air pollution is a national problem. Even if individual States were to set their own air quality standards, many would find their ability to meet their own standards undermined by dirty air blowing in from other States. Furthermore, economic pressures would prevent many States from enacting environmental requirements imposing significantly greater costs on their businesses than imposed on businesses in other States. The *amici* States have an interest in avoiding the "destructive race among states to attract industry by adopting the least stringent emissions-limits." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1355 (5th Cir. 1996), *cert denied*, 519 U.S. 1055 (1997). These scientific and political realities prevent most of the

States from unilaterally implementing or meeting state-specific standards; these same realities require the exercise of federal power, such as that at issue here.

Finally, the decision below has implications for the health and safety of the citizens of the States with respect to matters other than air pollution. By invoking the nondelegation doctrine to invalidate a broad congressional delegation of authority to a federal agency, the court below cast doubt on the validity of similar delegations in other areas. For example, the decision raises questions about the constitutionality of federal statutes governing pesticide residues in foods and hazardous waste transportation. *See, e.g.*, 21 U.S.C. § 346a(b) (EPA may establish a tolerance for levels of particular pesticides on food if it determines "that there is a reasonable certainty" that no harm will result from exposure); 42 U.S.C. § 6923(a) (requiring EPA to promulgate such standards for the transportation of hazardous waste "as may be necessary to protect human health and the environment"). EPA's discretion in adopting new or revised NAAQS is at least as circumscribed as the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a); *see also* 49 U.S.C. § 44701(d) (Federal Aviation Authority must act "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation"). The *amici* States have a fundamental interest in seeing that the health and safety of their residents do not

suffer as a result of the disruption of regulation in these other areas, which also by their nature demand a leading federal role.

SUMMARY OF ARGUMENT

In invalidating EPA's revised ozone and particulate matter (PM) NAAQS, the D.C. Circuit concluded that the constitutionality of Section 109's delegation of authority to EPA depends on whether the regulated substance is a threshold or a non-threshold pollutant and on the specific standards that EPA selected to minimize their presence in the ambient air. There is nothing in this Court's jurisprudence to suggest that a statute's constitutionality can possibly depend on the specific scientific categorization of the regulated object or the rules promulgated to address it.

The D.C. Circuit's further insistence that the statute can only be "saved" if EPA devises a mechanistic regulatory principle that explains precisely why it selected one standard rather than another has never been imposed by this Court. Instead, this Court has recognized, in other cases addressing non-threshold pollutants, that agencies implementing statutes to protect public health and safety in areas of scientific uncertainty must often make policy judgments when they select a regulatory point and should not be constrained by a mathematical straitjacket.

Finally, the D.C. Circuit's determination that EPA must enforce the revised eight-hour ozone NAAQS promulgated in 1997 in accordance with the classifications and attainment dates adopted by Congress in 1990 ignored the unambiguous

congressional intent that EPA is required to update, adopt and enforce more stringent standards as necessary to protect public health. The D.C. Circuit's cramped decision will create innumerable practical problems for those seeking to implement the Nation's clean air goals. Indeed, the panel's determination is consistent only with its staunch refusal to address the realities of air pollution – a reality *amici* States confront every day.

ARGUMENT

I. THE DELEGATION OF AUTHORITY TO THE EPA IN SECTION 109 OF THE CLEAN AIR ACT IS CONSTITUTIONAL.

The court below erred in concluding that section 109 is an unconstitutional delegation of congressional authority to an executive agency. In finding that section 109 does not contain the requisite "intelligible principle" to guide EPA's regulation of non-threshold pollutants, the court found an apparently constitutional difference in the type of pollutant being regulated and the degree of scientific knowledge available. In so doing, the D.C. Circuit departed from decades of precedent upholding substantially broader delegations, improperly limited congressional power to advance environmental health and safety, and crippled EPA's ability to effectuate Congress's intent.

Despite the D.C. Circuit's characterization of EPA's discretion as essentially unlimited, the Clean Air Act provides sufficiently tight reins on EPA's discretion to regulate air

pollution. EPA must set national ambient air quality standards that in its judgment are "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "accurately reflect the latest scientific knowledge." Moreover, the standards must be based on the air quality criteria specified in 42 U.S.C. § 7409(b)(1), which must themselves be "based on" the latest scientific information regarding the "kind and extent" of effects on public health and environment of the pollutant at issue. 42 U.S.C. § 7408(a)(2). Finally, EPA's discretion is further limited by the requirement that the proposed criteria and supporting documents be provided to the Clean Air Science Advisory Committee (CASAC) for review and that EPA justify any departure from CASAC's recommendations. 42 U.S.C. § 7607(d)(3).[1]

Congress thus recognized in the Clean Air Act that it was ordering EPA to act on the very frontiers of scientific knowledge. While EPA was given detailed guidance, and mandated to follow scientific advice, Congress recognized that, in the end, EPA would need to make a judgment call. This Court has noted and approved of Congress's need to direct agencies to operate in areas where practical limitations overwhelm scientific certainty. As the Court said in rejecting a recent nondelegation challenge to the authority given the Sentencing Guidelines Commission:

[1] In this case, where the CASAC recommendations for the ozone standard all fall into the range of .08 to .09 parts per million (ppm), EPA was effectively limited to the choice of a standard within that very narrow range. 175 F.3d at 1059.

> applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.

Mistretta v. United States, 488 U.S. 361, 371 (1989).

The decision below, however, rejects the wisdom of both Congress and this Court. It finds constitutional significance in the current scientific categorization of a pollutant and demands a level of scientific certainty that is simply unavailable. Where Congress understood it was ordering EPA to use its best judgment in light of available knowledge, the panel below prefers to pretend that no judgment is needed.

In invalidating EPA's revised ozone and $PM_{2.5}$ NAAQS, the D.C. Circuit seized on the fact that ozone and $PM_{2.5}$ are characterized as "non-threshold pollutants," which must be treated as if exposure might cause some adverse health effects in some people at any point along a continuum beginning at just above zero. According to the D.C. Circuit, section 109 of the Clean Air Act unconstitutionally delegates legislative power to EPA if the agency selects a point along a continuum of risk at which to set a national standard for non-threshold pollutants without being able to precisely explain why that point is "requisite to protect the public health" whereas a point slightly more or less stringent is not. If, however, EPA

had decided that zero was the only appropriate standard for non-threshold pollutants such as ozone and $PM_{2.5}$, or if it had instead determined that ozone and $PM_{2.5}$ are threshold pollutants, its application of section 109 would, by the D.C. Circuit's own account, have survived nondelegation attack. *See* 175 F.3d at 1038.[2] This rationale makes no constitutional sense. A statute's constitutionality cannot possibly depend on the specific standards selected to implement it. Nor can the distinction between threshold and non-threshold pollutants possibly determine the constitutionality of Congress's delegation of authority to regulate them.

Premising Congress's regulatory authority on that distinction also makes no scientific sense. The D.C. Circuit's insistence that EPA identify precisely how tall is "too tall" according to an imaginary yardstick of health effects demands a level of scientific certainty that is simply not available in the existing clinical and epidemiological evidence. As the court below has recognized in other cases, at the "frontiers of scientific knowledge," where the available information "may be insufficient to permit fully informed factual determinations," the EPA Administrator's decisions must rest "largely on policy judgments where no factual certainties exist." *Lead Industries Association v. United States Environmental Protection Agency*, 647 F.2d 1130, 1147 (D.C. Cir.), *cert. denied*, 449 U.S. 1042

[2] Although a zero standard would have avoided the D.C.Circuit's perceived nondelegation problem, the absurdity of a zero standard was recognized by the court when it stated that particulate matter would remain in the atmosphere even if the country entirely deindustrialized. *See* 175 F.3d at 1038 n. 4.

(1980). In such a situation, the court added, the Administrator should acknowledge the absence of scientific certainty and "go on to identify the considerations he found persuasive." *Id.* at 1147. Otherwise, EPA will be unable effectively to protect the public from these ubiquitous pollutants simply because the existing scientific evidence supports a narrow range of possibilities within which EPA selected a standard rather than a precise point along the continuum of risk.

The approach taken by the court below is not supported by any of this Court's nondelegation precedents, which have sustained administrative selection of standards along a continuum of possibilities without requiring Congress to provide a rigidly determinate principle to explain the precise point selected. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding congressional delegation to agency to fix prices of commodities at a level that "will be generally fair and equitable" in order to prevent "abnormal"price increases, "abnormal" market conditions and inflationary reductions in the standards of living of people on fixed incomes).

This Court has upheld broad delegations made necessary not only by the exigencies of war, but also by the exigencies of our limited scientific knowledge. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (the "*Benzene*" case), this Court implicitly rejected the D.C. Circuit's view that EPA must justify its selection of a health standard along a spectrum of increasing harm with a precision that is unattainable on the basis of existing scientific evidence. Eight members of the *Benzene*

Court sustained section 3(8) of the Occupational Safety and Health Act of 1970, authorizing the Occupational Safety and Health Administration (OSHA) to regulate workplace processes or pollutants if "reasonably necessary and appropriate to provide safe or healthful employment or places of employment." 29 U.S.C. § 652. Four of those eight Justices construed the standard as first requiring the agency to find a "significant risk of harm" before regulations could be promulgated as "reasonably necessary and appropriate." 448 U.S. at 642-43 (Stevens, J., announcing judgment of the Court).[3] Four others saw no need to engage in this very modest judicial narrowing of the standard. *See* 448 U.S. at 708-11 (Marshall, J., dissenting). But all eight Justices agreed that Congress could delegate authority to OSHA to select a regulatory point under either the statute's broad standard or one very slightly narrowed by judicial construction. Even though benzene is a non-threshold pollutant, like ozone and particulate matter, this Court saw no constitutional problem with

[3] Three members suggested that this narrowing interpretation averted nondelegation problems that might otherwise have arisen, *see* 448 U.S. at 646; another Justice expressed "no view" on whether a "different interpretation of the statute would violate the nondelegation doctrine," *see* 448 U.S. at 664, n.1 (Powell, J., concurring); and four Justices perceived no nondelegation problem with the statute as written, *see* 448 U.S. at 723-24. (Marshall, J., dissenting). Justice Rehnquist would have held that the nondelegation doctrine was violated by the congressional grant of broad authority to OSHA on grounds unrelated to this case (Rehnquist, J., concurring in judgment). *See* n.10 at page 15, *infra*. Although *Benzene* is not a constitutional holding, the nondelegation issue permeated the decision and its various opinions are relevant to the constitutional issue presented here.

Congress's delegation to OSHA of the authority to select the point on benzene's continuum of risk that should be characterized as "significant."

Indeed, as Justice Burger noted in concurrence, there is an implicit "policy judgment" in setting standards where there is no absolute scientific guidance. Moreover, he noted, it is acceptable for Congress to authorize the Secretary of Labor to make such policy judgments in determining whether a "risk of health impairments is significant in terms of the policy objectives of the statute." 448 U.S. at 663 (Burger, C.J., concurring).

Likewise, section 109 of the Clean Air Act acknowledges that the Administrator must make a policy determination, and explicitly authorizes her to do so, based on air quality criteria that reflect the latest scientific knowledge, as to whether existing or new standards are "requisite to protect the public health" with "an adequate margin of safety." Only by somehow conjuring up levels of scientific knowledge that are currently beyond our grasp, could Congress provide more detailed guidance to EPA or avoid having EPA exercise some policy judgment.

Nor has this Court ever held that a mechanistic regulatory principle, such as cost-benefit analysis, is required in areas of scientific uncertainty in order to save an otherwise constitutional delegation to an administrative agency.[4] To the

[4] The D.C. Circuit below suggested that cost-benefit analysis could accomplish precise line-drawing, but held that that approach was not available to cure section 109's supposed constitutional infirmity because

(continued...)

contrary, this Court has clearly sustained Congress's delegation of authority to OSHA to regulate workplace hazards and pollutants under a broad standard of preventing "significant risk" while refusing to require cost-benefit or similar formulaic analyses to limit the agency's discretion in selecting which exposure level along a spectrum of increasing harm creates a risk that is "significant." Indeed, as the *Benzene* plurality noted, "the requirement that a 'significant' risk be identified is not a mathematical straitjacket" and imposes no regulatory duty to "calculate the exact probability of harm." *Benzene*, 448 U.S. at 655.

Similarly, in *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1983) (the *Cotton Dust* case) this Court specifically rejected the argument that sections 3(8) and 6(b)(5) of the Occupational Safety and Health Act require OSHA to determine, before setting the level for a harmful physical agent "which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment

---

[4](...continued)
Congress had prohibited EPA from considering costs under Section 109. 175 F.3d at 1038. However, quantifying the benefits of a lower death rate in the monetary terms necessary to compare those benefits with the costs of obtaining them is not the precise exercise apparently desired by the D.C. Circuit. In fact, cost-benefit analysis can be used by an agency to mask its policy judgments in the supposedly neutral balancing of costs and benefits. For example, the very program cited approvingly by the panel below -- Oregon's allocation of medical treatment to the poor by dividing cost by "quality adjusted life years" -- was initially disapproved by the United States Department of Health and Human Services because it undervalued the quality of life of the disabled in violation of the Americans with Disabilities Act. 175 F.3d at 1039, n.4.

of health," 29 U.S.C. § 655(b)(5), that the health benefits to textile workers of its cotton dust standard outweigh the standard's costs.[5] The Court concluded that "Congress did not contemplate any further balancing by the agency for toxic material and harmful physical agents and we should 'not impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'" *Id.* at 513 (citation omitted).[6]

As this Court in *Cotton Dust* also made clear, "'[t]he judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere – in Congressional and Executive oversight or amendatory legislation.'" 452 U.S. at 540 (quoting *Benzene*, 448 U.S. at 663 (Burger,

---

[5] Section 6(b)(5) of OSHA differs from section 109 of the Clean Air Act because the OSHA Administrator, unlike the EPA Administrator, can broadly consider costs in determining whether its standard is "feasible." 29 U.S.C. §655(b)(5). However, the OSHA Administrator must first determine the existence of a "significant risk" at a point along a spectrum of risk. Thus, OSHA and EPA must operate in the same areas of scientific uncertainty in determining the "significance" of a risk or what is "requisite to protect the public health" and must make judgments that cannot be supported with the degree of scientific certainty required by the D.C. Circuit.

[6] In *Cotton Dust* and *Benzene*, then-Justice Rehnquist found a nondelegation problem with section 3(8) of OSHA because Congress did not decide whether cost-benefit analysis was authorized but instead left that decision to the agency. *See* 452 U.S. at 547. He added, however, that no nondelegation issue would have arisen if Congress had clearly authorized the Secretary of Labor to set exposure standards without "any kind of cost-benefit analysis." *Cotton Dust*, 452 U.S. at 545. Here, Congress, and not EPA, made the decision that EPA cannot consider costs in promulgating NAAQS for criteria air pollutants and therefore satisfied Justice Rehnquist's concern.

C.J., concurring)). In invalidating EPA's revised ozone and PM NAAQS, the D.C. Circuit has overridden this basic principle and improperly forced its view of sound environmental policy upon EPA and the democratically elected Congress.

The Clean Air Act effects a constitutional delegation of authority to EPA. Although the D.C. Circuit would have preferred EPA to rely on a mechanistic regulatory principle in setting the revised ozone and PM NAAQS, Congress's mandate that the agency exercise its judgment in areas of scientific uncertainty to protect the public health was fully constitutional.

II. THE D.C. CIRCUIT ERRED IN FINDING THAT THE NEW EIGHT-HOUR OZONE STANDARD MUST BE IMPLEMENTED IN ACCORDANCE WITH THE PROVISIONS APPLICABLE TO IMPLEMENTATION OF THE OLD ONE-HOUR STANDARD.

The D.C. Circuit erred in holding that the provisions of subchapter I, part D, subpart 2 of the Act, intended to govern implementation of the old one-hour ozone standard, 42 U.S.C. §§ 7511(a)-(f), also govern implementation of the revised eight-hour ozone standard. The D.C. Circuit's conclusory finding that section 181 – a section within subpart 2 – is applicable simply because it "clearly encompasses non-attainment designations" made under a new or revised ozone NAAQS, 175 F.3d at 1050, is inconsistent with the text of

section 181 and ignores practical realities. The classification scheme set forth in section 181 is incomprehensible when applied to the revised standard and its deadlines for compliance that passed in the 1990s are nonsensical when applied to a revised standard that would not be implemented until after 2000.

At the core of the D.C. Circuit's holding is its view of section 181(a)(1) of the Act, which is entitled "Classification and attainment dates for 1989 nonattainment areas." 42 U.S.C. § 7511(a)(1). This section has as its centerpiece a table that lists the air quality classifications and attainment deadlines for meeting the .12 ppm standard in effect at the time of the 1990 Amendments to the Act:

> **(a) Classification and attainment dates for 1989 nonattainment areas**
>
> (1) *Each area designated nonattainment for ozone pursuant to section 7407(d)* [*i.e.* § 107(d)] of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1. [emphasis supplied].

TABLE I

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

The crux of the D.C. Circuit's error lies in its unwarranted view of the cross-reference to § 107(d) [42 U.S.C.§ 7407(d)] in the first sentence of § 181(a)(1). Section 107(d)(4) provides for designations under specified standards, including the old one-hour ozone standard. *See* 42 U.S.C. § 7407(d)(4). Section 107(d)(1) provides for designations under a new or revised NAAQS. *See* 42 U.S.C.§ 7407(d)(1). Relying solely on the fact that the cross-reference is to section 107(d), rather than to section 107(d)(4) specifically, the court below concluded that section 181(a)(1) unambiguously encompasses implementation of the revised .08 ppm standard. *See* 175 F.3d at 1048-50. Finding no ambiguity, the court below then shoved

a round peg in a square hole, insisting on its reading despite its clearly unworkable results.

First, under the panel's reading, the deadlines simply make no sense. Section 181(a)(1) contains, on its face, classifications and deadlines that are pegged to the one-hour .12 ppm standard existing at the time of the 1990 Amendments, rather than to the lower .08 standard.[7] Attempting to apply these classifications and deadlines to the .08 standard has absurd consequences. For example, under the D.C. Circuit's holding, areas with ozone levels in the range of .120-.138 and .138-.160 were required to comply with the new eight-hour standard in 1993 and 1996, respectively, even though that standard was not promulgated until 1997. On the other hand, because the section 181(a)(1) compliance schedule is geared towards compliance with the .12 one- hour standard, it contains no deadlines for areas with design values between .08 (the level of the new standard) and .12. This means that areas in compliance with the old standard but out of compliance with the revised standard need never comply with the revised standard because they are subject to no deadlines under section 181(a)(1) for compliance with that standard. Requiring areas with design levels in excess of .12 to meet the new standard immediately (because the deadlines have already passed) while holding less polluted (but still noncompliant) areas to no compliance deadline at all is, at best, bizarre. It is also contrary to the intent of the section 181(a)(1) deadlines to provide more

[7] Even the D.C. Circuit recognized that the "design value" set forth in table 1 "is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary ozone standard." 175 F. 3d at 1046.

polluted areas with more, not less, time to come into compliance.

Second, the panel's reading results in methodological incoherence. Section 181(a)(1) provides that pollution levels that form the basis for the classifications (the "design value") should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Under the D.C. Circuit's interpretation, EPA would be bound by potentially obsolete pre-1990 methodologies in calculating the design values applicable under revised standards promulgated years later. Similarly, the panel's insistence that section 181 applies to the new standards leaves the process for reclassification, from attainment to nonattainment, unworkable.[8]

Finally, the panel decision leaves the States and EPA in an enforcement quandary: what exactly can they do when?[9]

---

[8] Under section 181(b)(1), areas that are reclassified to nonattainment with the old one-hour .12 standard are subject to the classification dates of section 181(a)(1), but with an extension equal to the time between enactment of the 1990 Amendments and reclassification as nonattainment. Thus, if an area is redesignated from attainment to marginal nonattainment with the one-hour standard in 2000 (10 years after the 1990 Amendments), it will have until 2003 (ten years after the original 1993 attainment deadline for marginal nonattainment areas) to comply with the standard. However, section 181(b)(1) specifies that this provision applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1). How to handle classification of nonattainment with the new standard is left unclear.

[9] The panel and Judge Tatel were unable to agree on a way to (continued...)

The panel below could not agree on what EPA was left room to do; certainly almost any action will lead, at the least, to litigation and delay.

If the impracticalities of the result were not enough to show the error of the panel's decision, a broader look at the context of the provision makes the error plain. Section 181(a) is entitled "Classification and attainment dates for *1989 nonattainment areas*." (emphasis added).[10]

---

[9](...continued)
conform the provisions of subpart 1 with the classifications and deadlines found in section 181. On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." 195 F. 3d at 11. However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1," 195 F. 3d at 13, appears to conflict directly with the panel's holding that it is section 181 of "[s]ubpart 2, not subpart 1, [that] provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS," 175 F. 3d at 1050 (emphasis supplied). Furthermore, Judge Tatel's interpretation that implementation of the revised standard under subpart 1 can begin in the vast majority of the nation that has attained the old standard is also inconsistent with the panel's determination, on rehearing, not to vacate the new standard pending remand "because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with subpart 2." 195 F. 3d at 10.

[10] In *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-29 (1947), the Court held that the title of a section, which was "but a short-hand reference to the general subject matter involved," would not "take the place of the detailed provisions of the text." In the instant case, by contrast, it is the title that clearly and precisely limits the reach of a provision whose language is ambiguous.

This Court has found, under similar circumstances, that the title of a statute provides valuable evidence of congressional intent in enacting an otherwise ambiguous statute. In *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), the Court interpreted a regulation that, on its face, prohibited any employment of deportable aliens. However, in light of the provision's title, "*Condition against unauthorized employment*," the Court held that the regulation prohibited not any employment of deportable aliens, but only *unauthorized* employment of such aliens. *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (considering the title of a section, and its legislative history, in construing a statute); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (holding that possible ambiguity of statute is resolved by the title of subsection at issue); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959) (the Title of an Act is "a useful aid in resolving an ambiguity").

Finally, the D.C. Circuit's decision is inconsistent with this Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that courts must defer to an agency's reasonable interpretation of ambiguous provisions in statutes they are charged with administering. Instead of deferring to an agency interpretation of section 181(a) of the Clean Air Act that is consistent with the substance and title of the provision, the D.C. Circuit elevates form over substance, substituting its own highly technical reading of the statute for the practical reading adopted by EPA. The cross-reference in section 181(a)(1) to section 107(d) rather

than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates at most an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (noting that "it would be difficult" to find a statute unambiguous in light of two dissents and a conflicting opinion of another court). Under these circumstances, the D.C. Circuit should have deferred to EPA's reasonable interpretation of the provisions at issue – an interpretation that effectuates the general statutory scheme, makes sense of the specific statutory provisions, and is consistent with the title of section 181(a)(1). *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (reemphasizing the need to give deference to an agency interpretation that is "reasonable in light of the legislature's revealed design") (citation omitted).

The D.C. Circuit's interpretation of section 181 is unworkable and irrational, and has no basis in proper statutory construction. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). The D.C. Circuit should instead have deferred to EPA's reasonable interpretation of the Act.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York

PREETA D. BANSAL
Solicitor General
(Counsel of record)
DANIEL X. SMIRLOCK
Deputy Solicitor General
LISA FEINER
J. JARED SNYDER
Assistant Attorneys General
Environmental Protection
Bureau
The Capitol
Albany, NY 12224
(212) 416-8479
Attorneys for the State of
New York

BILL LOCKYER
Attorney General of
California

RICHARD BLUMENTHAL
Attorney General of
Connecticut

ANDREW KETTERER
Attorney General of Maine

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland

PHILIP McLAUGHLIN
Attorney General of New
Hampshire

D. MICHAEL FISHER
Attorney General of
Pennsylvania

SHELDON WHITEHOUSE
Attorney General of Rhode
Island

WILLIAM H. SORRELL
Attorney General of
Vermont

Of Counsel

(20)

No. 99-1257

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

In The
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL DEFENSE, ET AL. ON BEHALF OF PETITIONERS

RICHARD L. REVESZ
Counsel of Record
40 Washington Square South
Suite 411-D
New York, N.Y. 10012
212-998-6185

VICKIE PATTON
Environmental Defense
1405 Arapahoe Avenue
Boulder, CO 80302
303-440-4901

ANN BREWSTER WEEKS
Clean Air Task Force
77 Summer Street, 8th Floor
Boston, MA 02110
617-292-0234

Counsel for Amici Curiae Environmental Defense, et al.

July 21, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE D.C. CIRCUIT'S REMAND OF THE EPA REGULATIONS IS BASED UPON A CONSTITUTIONALLY IMPERMISSIBLE APPLICATION OF THE NONDELEGATION DOCTRINE 3

II. THE D.C. CIRCUIT'S APPROACH IMPERMISSIBLY INTERFERES WITH THE PROPER FUNCTIONING OF THE DEMOCRATIC PROCESS 7

III. SECTIONS 108 AND 109 OF THE CLEAN AIR ACT DO NOT RUN AFOUL OF THE NONDELEGATION DOCTRINE 9

A. The Clean Air Act gives considerable guidance to EPA on how to set the NAAQS ... 9

B. The D.C. Circuit's suggestion that EPA was free to set the NAAQS at any level between zero and the concentration of London's Killer Fog stems from a misunderstanding of the Clean Air Act 14

C. The Court's jurisprudence establishes that the Clean Air Act does not violate the nondelegation doctrine 19

D. The D.C. Circuit's reliance on *Schechter Poultry* is misplaced 21

TABLE OF CONTENTS – Continued

Page

E. The D.C. Circuit also is mistaken in maintaining that broad delegations are permissible only in special circumstances..... 23

IV. THE D.C. CIRCUIT ERRED IN HOLDING THAT EPA'S AUTHORITY TO IMPLEMENT THE 8-HOUR OZONE STANDARD IS CONSTRAINED BY SECTION 181 OF THE CLEAN AIR ACT 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 19, 21, 22, 23

Amalgamated Meat Cutters v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971)..... 5

Baltimore Gas & Elec. Co. v. *NRDC*, 462 U.S. 87 (1983) 5

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837 (1984) ..8, 30

Commissioner v. *Clark*, 489 U.S. 726 (1989) 25

Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995)..... 29

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) 4

International Union, UAW v. *OSHA*, 938 F.2d 1310 (D.C. Cir. 1991)..... 5

J.W. Hampton & Co. v. *United States*, 276 U.S. 394 (1928) 3

Lichter v. *United States*, 334 U.S. 742 (1948).....19, 20

Loving v. *United States*, 517 U.S. 748 (1996) 3, 4, 20

Mistretta v. *United States*, 488 U.S. 361 (1989) 3, 4, 19, 22, 23

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 25

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 6, 8, 9

National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 19, 20

National Lime Ass'n v. *EPA*, 627 F.2d 416 (D.C. Cir. 1980).....6, 9

TABLE OF AUTHORITIES – Continued

Page

Panama Ref. Co. v. *Ryan*, 293 U.S. 388 (1935) . . 19, 21, 22

Touby v. *United States*, 500 U.S. 160 (1991) . . 3, 4, 19, 20, 23

Yakus v. *United States*, 321 U.S. 414 (1944) 19, 20, 22

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

§ 4(a)-(b), 5 U.S.C. § 553(b)-(c) 22

§ 10(e), 5 U.S.C. § 706(2)(A) 5

Clean Air Act, 42 U.S.C. § 7401 *et seq.*

§ 107(d), 42 U.S.C. § 7407(d) 24, 27, 28, 29

§ 107(d)(1)(A), (B), 42 U.S.C. § 7407(d)(1)(A), (B) 29

§ 107(d)(1)(C), 42 U.S.C. § 7407(d)(1)(C) 28, 29

§ 107(d)(3), 42 U.S.C. § 7407(d)(3) 29

§ 107(d)(4), 42 U.S.C. § 7407(d)(4) 28, 29

§ 108, 42 U.S.C. § 7408 . . . . . 2, 9, 11, 12, 19, 20

§ 108(a)(1), 42 U.S.C. § 7408(a)(1) 10

§ 108(a)(1)(A), 42 U.S.C. § 7408(a)(1)(A) 22

§ 108(a)(2), 42 U.S.C. § 7408(a)(2) 10, 11

§ 109, 42 U.S.C. § 7409 . . . . . *passim*

§ 109(b), 42 U.S.C. § 7409(b) 16, 17, 18

§ 109(b)(1), 42 U.S.C. § 7409(b)(1) 11, 14, 22

§ 109(b)(2), 42 U.S.C. § 7409(b)(2) 11

§ 109(d), 42 U.S.C. § 7409(d) 15, 28

TABLE OF AUTHORITIES – Continued

Page

§ 109(d)(1), 42 U.S.C. § 7409(d)(1) 12

§ 109(d)(2), 42 U.S.C. § 7409(d)(2) 23

§ 109(d)(2)(A), 42 U.S.C. § 7409(d)(2)(A) 12

§ 109(d)(2)(B), 42 U.S.C. § 7409(d)(2)(B) 12

§ 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) 28

§§ 171-179B, 42 U.S.C. §§ 7501-7509a 24

§ 172, 42 U.S.C. § 7502 . . . . . 25, 29

§ 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) 29

§ 172(a)(2), 42 U.S.C. § 7502(a)(2) 24, 25

§ 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A) 24, 29

§ 172(a)(2)(B), 42 U.S.C. § 7502(a)(2)(B) 24

§ 172(a)(2)(C), 42 U.S.C. § 7502(a)(2)(C) 24

§ 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D) 25

§ 181, 42 U.S.C. § 7511 . . . . . *passim*

§ 181(a)(1), 42 U.S.C. § 7511(a)(1) 25, 26, 27, 28

§§ 181-185B, 42 U.S.C. §§ 7511-7511f 24

§§ 181-192, 42 U.S.C. §§ 7511-7514a 24

§ 302(h), 42 U.S.C. § 7602(h) 11, 12, 21

§ 307(d), 42 U.S.C. § 7607(d) 22

§ 307(d)(2), (4)(A), 4(B)(ii), (5), 42 U.S.C. § 7607(d)(2), (4)(A), 4(B)(ii), (5) 22

§ 307(d)(2)-(7), 42 U.S.C. § 7607(d)(2)-(7) 22

TABLE OF AUTHORITIES – Continued

Page

§ 307(d)(3), 42 U.S.C. § 7607(d)(3) 12, 23

§ 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A) 5

MISCELLANEOUS:

44 Fed. Reg. (1979)

p. 8202 26

p. 8218 27

61 Fed. Reg. (1996)

p. 65,641 18

pp. 65,641-44 18

p. 65,644 17

pp. 65,721-22 15

p. 65,722 15

p. 65,725 16

p. 65,727 ..... 15, 16

p. 65,728 16

p. 65,729 16

62 Fed. Reg. (1997)

p. 38,655 18

p. 38,676 18

p. 38,859 15

p. 38,860 15

p. 38,861 16

TABLE OF AUTHORITIES – Continued

Page

pp. 38,861-63 27

p. 38,864 16

pp. 38,867-68 17

p. 38,868 17

pp. 38,884-85 30

40 C.F.R. § 50.9(a) 26

S. Rep. No. 91-1196 (1970) 13

Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969) 6

INTEREST OF *AMICI CURIAE*

Amici curiae Environmental Defense (formerly Environmental Defense Fund), Clean Air Council, East Michigan Environmental Action Council, Environmental Law and Policy Center of the Midwest, Hoosier Environmental Council, Inc., Illinois Environmental Council, The Izaak Walton League of America, Inc., Legal Environmental Assistance Foundation, Inc., Michigan Environmental Council, Ohio Citizen Action, The Ohio Environmental Council, Southern Environmental Law Center, Tennessee Environmental Council, and Valley Watch, Inc., are fourteen not-for-profit organizations working to improve public health and environmental quality throughout the United States. Environmental Defense, et al. seek healthier air quality on behalf of their many thousands of members who live and raise families in communities across the country that have air pollution concentrations in excess of the ozone and particulate matter standards under review in this case.[1]

SUMMARY OF ARGUMENT

The D.C. Circuit followed a constitutionally impermissible path in remanding, on nondelegation grounds, the regulations challenged in this case. Instead of determining whether the Clean Air Act provided an "intelligible principle" to guide the agency's exercise of its discretion, the D.C. Circuit scrutinized the agency's explanation for how it chose to set the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. The D.C. Circuit's approach does not promote

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, and the corresponding documentation is simultaneously being filed with the Court.

the key purpose of the nondelegation doctrine – that core political decisions be made by Congress – and improperly constitutionalizes the requirement in the Administrative Procedure Act (APA) that an agency adequately explain its actions.

Moreover, the D.C. Circuit's insistence that EPA constrain its discretion in a manner that is binding on future Administrations places impermissible limits on how the democratic process functions. Its approach threatens the connection of administrative agencies to the political process, which legitimates administrative action.

Because it dispensed with any analysis of the statute, the D.C. Circuit overlooked the considerable guidance that sections 108 and 109 of the Clean Air Act give EPA on how to set the NAAQS. This guidance easily is more extensive and no less determinate than the guidance at issue in several cases in which the Court rejected nondelegation challenges, and clearly meets the Court's "intelligible principle" standard.

Finally, the D.C. Circuit was mistaken in holding that the nonattainment provisions of the Clean Air Act constrain EPA's authority to implement the challenged NAAQS for ozone. The D.C. Circuit believed that this conclusion was necessary to accord the same meaning to the same words used in different parts of the statute. In fact, however, this objective can be achieved only by concluding that the Clean Air Act does not constrain EPA's implementation authority. More generally, the structure of the nonattainment provisions compels the conclusion that EPA's authority to implement the challenged standard is not constrained. At the very least, EPA's interpretation to that effect is permissible and is not inconsistent with the clear intent of Congress.

ARGUMENT

I. THE D.C. CIRCUIT'S REMAND OF THE EPA REGULATIONS IS BASED UPON A CONSTITUTIONALLY IMPERMISSIBLE APPLICATION OF THE NONDELEGATION DOCTRINE

The D.C. Circuit's justification for remanding the challenged NAAQS bears no resemblance to any accepted application of the constitutional doctrine of nondelegation. The Court repeatedly has held that the most important purpose of the nondelegation doctrine is to ensure that core political decisions are made by Congress, and that where Congress delegates authority to an administrative agency it provides an "intelligible principle" to guide the exercise of the agency's discretion. See *Loving* v. *United States*, 517 U.S. 748, 771 (1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co.* v. *United States*, 276 U.S. 394, 409 (1928).

Despite the Court's clear articulation of these central concerns of the nondelegation doctrine, the D.C. Circuit did not even attempt to analyze the nature of the constraints *Congress* placed on the agency's exercise of discretion. Instead, it delved immediately into the *agency's* explanations for the choice it made pursuant to that discretion. The opinion states explicitly: "We begin with the criteria EPA has announced for assessing health effects in setting the NAAQS for non-threshold pollutants." Pet. App. 6a. The D.C. Circuit's holding similarly focused on EPA's exercise of its discretion: "We find that the construction of the Clean Air Act *on which EPA relied* in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power." Pet. App. 4a (emphasis added).

The D.C. Circuit's preoccupation with the agency rather than Congress – the institution that is the focus of the nondelegation doctrine's concern – is particularly problematic given the circuit's own admission that the approach it took does not serve "the third key function of non-delegation doctrine [sic]", which is to ensure " 'that important choices of social policy are made by Congress.' " Pet. App. 14a. (quoting *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (*Benzene*) (Rehnquist, J., concurring)). This "third" function, which the D.C. Circuit chose to leave unfulfilled, is the only rationale for the nondelegation doctrine on which the Court has consistently relied. See, *e.g.*, *Loving*, 517 U.S. at 771-72; *Touby*, 500 U.S. at 164-66; *Mistretta*, 488 U.S. at 371-73; see also Pet. App. 95a n.2 ("It is . . . only this so-called 'third' purpose . . . that has any connection to the doctrine's constitutional source.") (Silberman, J., dissenting from the denial of rehearing en banc).

In explaining why it was choosing a remedy that did not serve the key function of the nondelegation doctrine, the panel noted, citing *Mistretta*: "[W]e do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence [in the *Benzene* case]." Pet. App. 14a. But the nondelegation doctrine simply does not have a "weak" version that is served by setting aside regulations as well as a "strong" version that compels declaring statutes unconstitutional. There is only one nondelegation doctrine, and its focus is on the actions of Congress.

The D.C. Circuit advanced two rationales for ordering the agency to constrain its discretion: to discourage the agency from "exercis[ing] the delegated authority arbitrarily" and to promote "meaningful judicial review."

Pet. App. 14a. But both these goals are served by "arbitrary and capricious" review under the APA. See 5 U.S.C. § 706(2)(A); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97-98 (1983).[2] Given the broad oversight exercised by the courts pursuant to this APA provision, a further constitutionally based requirement designed to serve essentially the same purposes is wholly unnecessary.

Not only is the D.C. Circuit's approach to the nondelegation doctrine analytically unsound, but it is virtually unsupported by precedent. The D.C. Circuit repeatedly cited a prior decision, *International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1316-18 (D.C. Cir. 1991) (*Lockout-Tagout I*), in which it similarly misapplied the nondelegation doctrine to invalidate a regulation. See Pet. App. 11a-15a.

The only other case on which the D.C. Circuit relied, *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J., for a three-judge court), is inapposite. See Pet. App. 14a. Unlike the opinion below, Judge Leventhal's analysis began, as is appropriate under the nondelegation doctrine, with an exhaustive analysis of the legislative materials. See *Amalgamated Meat Cutters*, 337 F. Supp. at 747-58. Following this review, Judge Leventhal stated that administrative discretion also is confined by "the requirement that any action taken by the Executive under the law . . . must be in accordance with further standards as developed by the Executive." *Id.* at 758. Judge Leventhal viewed this requirement as one of "intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective." *Id.* at 759. Nowhere does the opinion state that

---

[2] The Clean Air Act's judicial review provisions call for "arbitrary and capricious" review. See 42 U.S.C. § 7607(d)(9)(A).

the requirement of administrative explanation derives from the Constitution's nondelegation doctrine.

In fact, subsequent cases make clear that the requirement that agencies provide detailed explanations for their regulations is an integral part of "arbitrary and capricious" review under the APA, and, in particular, of the "hard look" doctrine. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983); *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980).

The intellectual foundation for the D.C. Circuit's approach appears to come from Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969).[3] Davis urged courts to "acknowledge that the nondelegation doctrine is unsatisfactory and to *invent* better ways to protect against arbitrary administrative power." *Id.* at 713 (emphasis added). Davis added that the purpose of the nondelegation doctrine "should no longer be either to prevent delegations of legislative power or to require meaningful statutory standards." *Id.*; see also *id.* at 725. Instead, he proposed shifting "[t]he focus of judicial inquiries . . . from statutory standards to administrative safeguards and administrative standards." *Id.* Like Davis, the D.C. Circuit freely acknowledged that under its approach, "[t]he agency will make the fundamental policy choices." Pet. App. 14a.

Davis' position had no doctrinal grounding at the time that it was made; his use of the term "invent" is revealing on this score. Moreover, the Court has never

---

[3] Although the only time that the D.C. Circuit cited the Davis article it gave it a "but see" signal, Pet. App. 76a, the approach of the court below bears a strong resemblance to Davis'.

accepted his invitation to reconceptualize the nondelegation doctrine, and has continued to view this doctrine as a constraint on congressional – not administrative – action.

In summary, as Judge Silberman stated, the D.C. Circuit's approach is "fundamentally unsound." Pet. App. 92a (Silberman, J., dissenting from the denial of rehearing en banc). The nondelegation doctrine cannot "be employed to force an agency to narrow a broad legislative delegation from Congress." *Id.*

II. THE D.C. CIRCUIT'S APPROACH IMPERMISSIBLY INTERFERES WITH THE PROPER FUNCTIONING OF THE DEMOCRATIC PROCESS

The D.C. Circuit's approach also places impermissible constraints on the democratic process. In its opinion on the petitions for rehearing, the panel majority made clear that no administrative explanation – no matter how well-reasoned or detailed – would satisfy its approach to the nondelegation doctrine unless it contained an express constraint on the agency's *future* discretion. For example, EPA had explained in the regulatory materials that it had set the annual standard for particulate matter on the basis of evidence of adverse health effects that was statistically significant at the 95th confidence level, and that it had set the ozone standards to protect against adverse health effects that were not transient. Pet. App. 73a & nn. 1-2; see *infra* Part III.B. The D.C. Circuit reacted to this argument as follows:

> To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a

> later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects.

Pet. App. 73a. Thus, the D.C. Circuit insisted that EPA's approach to these matters be frozen not only with respect to future NAAQS for ozone and particulate matter – the contaminants at issue in this case – but also for NAAQS for all other contaminants.

The D.C. Circuit's approach threatens an important source of the legitimacy of agency action: the connection of administrative agencies to the political process. As the Court has observed:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837, 865-66 (1984).

It is inconsistent with long-established norms concerning the role of administrative agencies to hold, as the D.C. Circuit did, that where Congress vests regulatory discretion in an agency, the first Administration that exercises this discretion is *required* to bind all future Administrations. Instead, if a statute does not prescribe a particular outcome, different Administrations should be able to exercise congressionally delegated discretion in different ways. See *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider . . . the wisdom of its policy on a continuing basis."); *State Farm*, 463 U.S. at 42 ("[R]egulatory agencies do not establish rules of conduct to last forever and . . . must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.") (citations omitted).

The Court has held that the APA requires an agency that changes a prior policy to explain the reasons for this change. See *State Farm*, 463 U.S. at 41-42. It has never held, however, that the Constitution prevents an agency from changing its policy altogether. Given the nature of the policy dispute in this case, such a position would be particularly destructive of the connection between agency action and political legitimacy. Should a future Administration that favors more stringent environmental regulation be precluded from regulating on the basis of a lower confidence level – say 90% instead of 95%? *Cf. National Lime*, 627 F.2d at 454 n.139 ("Agencies are not limited to scientific fact, to 95% certainties."). Or should such an Administration be barred from concluding that transient effects can be adverse? The D.C. Circuit's approach would compel affirmative answers to both these questions, contrary to the key reason why our constitutional scheme has periodic presidential elections: so that the voters can put in place Administrations that are responsive to their views.

III. SECTIONS 108 AND 109 OF THE CLEAN AIR ACT DO NOT RUN AFOUL OF THE NON-DELEGATION DOCTRINE

A. The Clean Air Act gives considerable guidance to EPA on how to set the NAAQS

The congressional delegation relevant to this case is primarily contained in sections 108 and 109 of the Clean Air Act. 42 U.S.C. §§ 7408, 7409. Section 108 – which the D.C. Circuit's panel majority overlooked altogether –

requires EPA to establish air quality criteria that will serve as the basis for the agency to then set the NAAQS under section 109.

Section 108(a)(1) requires the EPA Administrator to list the pollutants for which NAAQS will eventually be set. The Administrator must place on this list each air pollutant that meets two principal requirements:

> (A) [the] emissions of [the pollutant], in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; [and]
>
> (B) the presence of [the pollutant] in the ambient air results from numerous or diverse mobile or stationary sources.

42 U.S.C. § 7408(a)(1). Thus, only pollutants "which may reasonably be anticipated to endanger public health or welfare" can be regulated. Moreover, such pollutants can be regulated only if they have an effect on the "ambient air" – as opposed to, for example, on indoor air. Even pollutants that do have an effect on ambient air can be regulated only if they are produced by "*numerous or diverse* mobile or stationary sources." (emphasis added).

Following the listing of a pollutant, the Administrator must prepare air quality criteria. 42 U.S.C. § 7408(a)(2). The statute provides:

> Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on –
>
> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and
>
> (C) any known or anticipated adverse effects on welfare.

42 U.S.C. § 7408(a)(2). Thus, such criteria must be based on "the latest scientific knowledge," and must indicate "all identifiable effects on public health and welfare." The statute also requires the consideration of interactions among pollutants.

Section 109(b)(1) prescribes the level at which primary NAAQS must be set:

> National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.

42 U.S.C. § 7409(b)(1). The statute therefore provides that the primary NAAQS must meet three requirements: they must be "based on" the air quality criteria developed under section 108, they must be "requisite to protect the public health," and they must provide "an adequate margin of safety."

In turn, section 109(b)(2) prescribes that the secondary standards must also be "based on" the air quality criteria and must be "requisite to protect the public welfare." *Id.* § 7409(b)(2). For the latter inquiry, both "known or anticipated" adverse effects must be taken into account. Section 302(h), moreover, contains a statutory definition of the term "public welfare," which requires

EPA to take account of an extensive set of factors in fashioning the secondary standards. See 42 U.S.C. § 7602(h).

Section 109 further requires the Administrator to review, at least at five-year intervals, the air quality criteria as well as both the health-based primary standards and the welfare-based secondary standards. In undertaking this review, the Administrator must "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 . . . and subsection (b) of . . . section [7409]". *Id.* § 7409(d)(1). Thus, the statutory requirements that govern the initial promulgation of the standards apply also to their revision.

The statute also prescribes an institutional structure to aid the Administrator in revising the criteria and standards. For this purpose, the Administrator must "appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies." *Id.* § 7409(d)(2)(A). This committee "shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate." *Id.* § 7409(d)(2)(B). If the regulations establishing the NAAQS depart in any important respect from the recommendations of this group, EPA must explain the reasons for such a departure. *Id.* § 7607(d)(3).

The Clean Air Act's legislative history provides further guidance on the level at which the NAAQS should be set. The report of the Senate Committee on Public Works stresses that concern with health effects must extend to particularly sensitive populations: "[I]ncluded

among those persons whose health should be protected by the ambient standard are particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment." S. Rep. No. 91-1196, at 10 (1970). The report states, however, that the NAAQS "will not necessarily provide for the quality of air required to protect those individuals who are otherwise dependent on a controlled internal environment." *Id.*

The report makes clear that the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals. Under this approach, ambient air quality sufficiently protects sensitive populations if there is an "absence of adverse effect on the health of a statistically related sample of persons in sensitive groups." *Id.* The report further specifies that "a statistically related sample is the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air." *Id.*

Thus, the legislative history explains that the determination of adverse health effects must be made with respect to certain groups in the general population. It also explains what counts as a group for this purpose.

In summary, Congress gave considerable guidance to EPA on how to set the NAAQS. In failing to examine the nature of the legislative direction, the D.C. Circuit missed the central point of the nondelegation doctrine.

B. The D.C. Circuit's suggestion that EPA was free to set the NAAQS at any level between zero and the concentration of London's Killer Fog stems from a misunderstanding of the Clean Air Act

The preceding analysis of the legislative guidance shows that the D.C. Circuit was simply mistaken when it stated, with rhetorical flourish, that EPA is "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." Pet. App. 13a. The D.C. Circuit's characterization stems from an erroneous understanding of the statutory scheme, and in particular, of the trigger for revisions of the NAAQS, the manner in which adverse effects on public health are determined, and the types of sensitive populations that the standards are designed to protect.

The D.C. Circuit recognized that the London Killer Fog "led to 4,000 excess deaths in a week." Pet. App. 11a. It is difficult to imagine any plausible interpretation of the statutory command that would allow such a calamity. See 42 U.S.C. § 7409(b)(1) (NAAQS must be set at levels that "allowing an adequate margin of safety, are requisite to protect the public health").

Similarly, the Administrator would be able to set a standard of zero only if such a standard is "requisite to protect the public health," "allowing an adequate margin of safety." *Id.* The Clean Air Act's legislative history, discussed in Part III.A, *supra*, makes clear that even if some *individual's* health would be promoted by a standard of zero, the Administrator is precluded from promulgating such a standard if at this level there is no statistically significant evidence of an adverse health effect in a *population*.

An examination of the administrative record illustrates the nature of these constraints on EPA's discretion. In the case of ozone, EPA began, consistent with the legislative command, by defining the sensitive populations – the populations that experience adverse health effects at the lowest concentrations. EPA determined that three populations were particularly sensitive: active children, outdoor workers, and individuals with preexisting respiratory disease (for example, asthma or chronic obstructive lung disease). 61 Fed. Reg. 65,716, 65,721-22 (1996).

The agency then considered what should count as an "adverse health effect" for these sensitive populations. To make this determination, EPA looked to guidelines published by the American Thoracic Society, which used the following definition:

> [M]edically significant physiologic or pathologic changes generally evidenced by one or more of the following: (1) Interference with the normal activity of the affected person or persons, (2) episodic respiratory illness, (3) incapacitating illness, (4) permanent respiratory injury, and/or (5) progressive respiratory dysfunction.

Id. at 65,722; see 62 Fed. Reg. 38,856, 38,860 (1997).

In justifying a need for a revision of the existing standard pursuant to section 109(d), see Part III.A, *supra*, EPA noted that "a significant body of information" that became available after the promulgation of the ozone NAAQS then in effect provided "clear evidence from human clinical studies" of adverse health effects at concentrations permitted by the then-existing standard. 61 Fed. Reg. at 65,727; see 62 Fed. Reg. at 38,859.

One of the ways in which EPA revised the NAAQS for ozone was to extend the averaging period from 1 hour to 8 hours on the ground that "[t]he 8-hour averaging

time is more directly associated with health effects of concern at lower [ozone] concentrations than is the 1-hour averaging time." 61 Fed. Reg. at 65,727; 62 Fed. Reg. at 38,861. This change reflects the conclusion that a high concentration during one hour might not cause adverse health effects if it is followed by sufficiently lower concentrations in subsequent hours.

Because under an 8-hour averaging period a high concentration during one hour can be offset by a sufficiently lower concentration in other portions of the 8-hour period, EPA determined that the 1-hour 0.12 parts per million (ppm) standard then in effect was essentially equivalent to a 0.09 ppm standard with an 8-hour averaging period. See 61 Fed. Reg. at 65,729; see also *id.* at 65,725, 65,728; 62 Fed. Reg. at 38,864.

EPA then determined that a standard of 0.08 ppm was preferable to one of 0.09 ppm in light of the statutory mandate of section 109(b). First, children active outdoors would experience significantly higher decreases in lung function and pain on deep inspiration under a standard of 0.09 ppm as compared to a standard of 0.08 ppm. Under a standard of 0.09 ppm between 40 and 65 percent more children would experience such effects, and there would be 120 percent more yearly occurrences of such effects. These percentages would translate into tens of thousands of more affected children and hundreds of thousands more yearly occurrences. Second, a risk assessment revealed that a 0.09 ppm standard would result in 40 more yearly hospital admissions for respiratory causes of asthmatics in New York City alone (a 40 percent increase). Third, a standard of 0.09 ppm would allow more than three times as many children to experience exposures of concern. Fourth, EPA determined that these

examples were indicators of public health impacts in the broader population. See 62 Fed. Reg. at 38,867-68.

Moreover, as Judge Tatel discussed at length in his dissent, EPA determined that setting the standard at a more stringent level – 0.07 ppm – was unwarranted under section 109(b). Pet. App. 64a (Tatel, J., dissenting). He observed that no single member of EPA's scientific review committee had recommended setting the standard below 0.08 ppm. *Id.* He also pointed to EPA's explanation that the adverse health effects below 0.08 ppm were qualitatively different. *Id.*; see 62 Fed. Reg. at 38,868 (at a level of 0.07 ppm, the most serious adverse health effects of ozone "are less certain, both as to percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects"); see also Pet. App. 64a-65a (Tatel, J., dissenting) (referring to EPA's additional technical explanation for its decision).

EPA followed a comparable approach in revising the NAAQS for particulate matter (PM). It defined five categories of sensitive populations: (1) individuals with respiratory and cardiovascular disease, who are at greater risk of premature mortality and hospitalization; (2) individuals with infectious respiratory disease, who are at greater risk of premature mortality and morbidity; (3) elderly individuals, who are at greater risk of premature mortality and hospitalization for cardiopulmonary causes; (4) children, who are at greater risk of increased respiratory symptoms and decreased lung function; and (5) asthmatic children and adults, who are at risk of more serious symptoms. See 61 Fed. Reg. 65,638, 65,644 (1996).

EPA justified the need for revising the NAAQS for particulate matter as follows:

> [S]ince the last review of the PM criteria and standards, the most significant new evidence on the health effects of PM is the greatly expanded body of community epidemiological studies. The Criteria Document stated that these recent studies provide "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban airsheds even at concentrations below current U.S. PM standards."

61 Fed. Reg. at 65,641; see 62 Fed. Reg. 38,652, 38,655 (1997).

EPA paid considerable attention to how the standard should be derived from the epidemiological studies. The Administrator based the annual standard on the level at which the concentration of particulate matter was linked to statistically significant increases, at a 95% confidence level, see Part II, *supra*, in the risk of adverse health effects across a number of study locations. See 62 Fed. Reg. at 38,676; 61 Fed. Reg. at 65,641-44.

In summary, EPA's discretion was constrained by the legislative direction of the Clean Air Act. The agency followed the congressional direction in finding a need for revising the existing standards and for determining that more stringent standards were necessary to fulfill the statutory mandate in section 109(b). EPA was also constrained by the legislative command to protect populations rather than individuals. The preceding analysis thus clearly establishes that the D.C. Circuit erred in suggesting that the Clean Air Act permits EPA to set the NAAQS

at any level between a concentration of zero and the concentration present during the London Killer Fog.

C. The Court's jurisprudence establishes that the Clean Air Act does not violate the nondelegation doctrine

In the over 200 years of its history, the Court has struck down a statute on nondelegation grounds in only two cases. See *Mistretta*, 488 U.S. at 373. These cases, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), were both decided in 1935 and both involved challenges to the National Industrial Recovery Act (NIRA) – one of the economic recovery statutes of the New Deal. Both are inapposite for reasons discussed in Part III.D, *infra*.

Since 1935 the Court has validated broad delegations in a variety of areas. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 746, 785-86 (1948) (recovery of "excessive profits" under the Renegotiation Act); *Yakus* v. *United States*, 321 U.S. 414, 420, 426-27 (1944) (establishment of "fair and equitable prices" under the Emergency Price Control Act); *National Broad. Co.* v. *United States*, 319 U.S. 190, 215, 225-26 (1943) (regulation pursuant to a "public interest, convenience, or necessity" standard under the Communications Act). In each of those cases, Congress provided guidance that was less extensive and no more determinate than that provided by sections 108 and 109 of the Clean Air Act, as described in Part III.A, *supra*.

In one of the more recent nondelegation cases, *Touby v. United States*, 500 U.S. at 160, the Court unanimously upheld a delegation that employed guidance similar to that at issue here. *Touby* involved a delegation to the Attorney General under the Controlled Substances Act to

establish categories or "schedules" of controlled substances that are to be regulated by the Act. The statute authorized the Attorney General to schedule a substance through an expedited procedure when doing so is "necessary to avoid an imminent hazard to the public safety." *Touby*, 500 U.S. at 163 (quoting section 201(h) of the Act).

Citing *Lichter*, *Yakus*, and *National Broadcasting*, the Court stated that in light of its nondelegation precedents "one cannot plausibly argue that [the] 'imminent hazard to the public safety' standard is not an intelligible principle." *Id.* at 165. By comparison, the terms "endanger public health or welfare" in section 108 of the Clean Air Act, and "requisite to protect the public health" and "requisite to protect the public welfare" in section 109 are no broader than the "imminent hazard to the public safety" standard upheld in *Touby*. Moreover, the other forms of congressional guidance contained in the Clean Air Act and discussed in Part III.A, *supra*, were absent in *Touby*.

Furthermore, the Court held that the delegation at stake in *Touby* "passes muster even if greater congressional specificity is required in the criminal context." *Id.* at 166. In contrast, under sections 108 and 109 of the Clean Air Act, which do not give rise to risks to individual liberty, such heightened congressional guidance is not required.

Only four years ago, in *Loving* v. *United States*, 517 U.S. 748 (1996), the Court unanimously reemphasized the breadth of permissible delegations: "Though in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms." *Id.* at 771.

The Clean Air Act's guidance – the constraints on the reach of agency authority in section 108, the statutory

standards in section 109, the required consultation with expert scientists, the definition of public welfare in section 302(h), and the legislative history's determination of what groups should be protected by the NAAQS – is considerable. Certainly, the grant of legislative authority in the Clean Air Act provides no warrant for departing from more than half a century of consistent practice upholding congressional delegations.

D. The D.C. Circuit's reliance on *Schechter Poultry* is misplaced

The panel majority's arguments casting doubt on the constitutionality of the congressional delegation rely primarily on *Schechter Poultry*. See Pet. App. 12a. None of these arguments, however, has any merit.

The D.C. Circuit stated that "[t]he standards in question affect the whole economy, requiring a 'more precise' delegation than would otherwise be the case." Pet. App. 12a. Like almost all regulations, the NAAQS "affect the whole economy" in the sense that they affect the price of certain goods, which in an interrelated economy, may affect the prices of other goods and services. But the NAAQS regulate only the concentration of air pollution, and as discussed in Part III.A, *supra*, apply only to a subset of air pollutants, only to pollutants in ambient air, and only to pollutants emitted by certain types of sources. That is a far cry from the all-encompassing, multifaceted delegation of the NIRA, which gave the President the authority to establish "codes of fair competition" governing a broad set of issues, including wages and hours as well as marketing and competitive practices for a broad set of industries. See *Schechter Poultry*, 295 U.S. at 521-24; *Panama Refining*, 293 U.S. at 405-10.

Furthermore, the delegation under the Clean Air Act does not exhibit the features that were problematic in *Schechter Poultry*. First, there is no delegation to private individuals. See *Mistretta*, 488 U.S. at 373 n.7; *Yakus*, 321 U.S. at 424; *Schechter Poultry*, 295 U.S. at 537.

Second, the D.C. Circuit itself acknowledged that EPA's interpretation of the terms "endanger public health" in section 108(a)(1)(A) and "requisite to protect the public health" in section 109(b)(1) is informed by the meaning these terms have in the medical community. See Pet. App. 15a-16a. In contrast, in *Schechter Poultry*, the concept of "fair competition" had no meaning that could be ascertained from external sources. See *Schechter Poultry*, 295 U.S. at 531-33.

A third problem with the NIRA was the absence of administrative procedures, which made it difficult for the courts to assess how the President had carried out his delegated discretion. See *Schechter Poultry*, 295 U.S. at 533-34; *Panama Refining*, 293 U.S. at 431-32. The Clean Air Act, in contrast, contains extensive procedural protections. Section 307(d) requires the Administrator to follow notice-and-comment rulemaking procedures that are more extensive than those prescribed in the APA. Compare 42 U.S.C. § 7607(d)(2)-(7) with 5 U.S.C. § 553(b)-(c). For example, section 307(d) requires EPA to establish a "rulemaking docket" open to the public; to place in this docket communications with the Office of Management and Budget pursuant to any interagency review process; and to provide interested persons with an opportunity for "oral presentation of data, views, or arguments." 42 U.S.C. § 7607(d)(2), (4)(A), 4(B)(ii), (5). Moreover, as discussed in Part III.A, *supra*, the Administrator must appoint an independent scientific committee to review and recommend revisions to the criteria documents and

the NAAQS, and must explain her reasons for departing from the committee's recommendations. See 42 U.S.C. §§ 7409(d)(2), 7607(d)(3).

In summary, the Clean Air Act does not present any of the problems that led the Court to declare unconstitutional the delegation at issue in *Schechter Poultry*.

E. The D.C. Circuit also is mistaken in maintaining that broad delegations are permissible only in special circumstances

The D.C. Circuit also suggested that this case is unlike ones in which broad delegations were upheld because it does not involve " 'special theories' justifying vague delegations such as the war powers of the President or the sovereign attributes of the delegatee." Pet. App. 12a. But, as discussed in Part III.C, *supra*, in recent years, the Court has upheld broad delegations in cases that do not implicate such "special theories." See, *e.g.*, *Touby*, 500 U.S. at 165-67 (delegation to the Attorney General to designate controlled substances); *Mistretta*, 488 U.S. at 371-79 (delegation to the U.S. Sentencing Commission to promulgate sentencing guidelines).

IV. THE D.C. CIRCUIT ERRED IN HOLDING THAT EPA'S AUTHORITY TO IMPLEMENT THE 8-HOUR OZONE STANDARD IS CONSTRAINED BY SECTION 181 OF THE CLEAN AIR ACT

A brief review of the structure of the nonattainment provisions of the Clean Air Act reveals why the D.C. Circuit was mistaken in holding that section 181 constrains EPA's authority to implement the 8-hour ozone

standard of 0.08 ppm promulgated in 1997.[4] The Clean Air Act's nonattainment provisions govern the regulation of areas that do not meet the NAAQS. Subpart 1, entitled "Nonattainment Provisions in General," applies to all of the pollutants for which EPA has promulgated NAAQS. See 42 U.S.C. §§ 7501-7509a. Subparts 2 through 5 deal with additional pollutant-specific provisions. See *id.* §§ 7511-7514a. In particular, Subpart 2, entitled "Additional Provisions for Ozone Nonattainment Areas," applies to ozone. See *id.* §§ 7511-7511f.

Both the general provisions of Subpart 1 and the specific provisions of Subpart 2 prescribe dates by which the NAAQS must be attained. In Subpart 1, section 172(a)(2) provides, in language added by the 1990 amendments, that primary standards must be met

> as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation of nonattainment . . .

Id. § 7502(a)(2)(A). (Two additional one-year extensions are also possible. *Id.* § 7502(a)(2)(C).) Section 172(a)(2) also requires that secondary standards be met "as expeditiously as practicable" but imposes no outside limit on that time. *Id.* § 7502(a)(2)(B).

---

[4] This brief focuses on the merits rather than the justiciability of the implementation issues. *Amicus* Environmental Defense has argued before the lower courts that EPA did not resolve important implementation issues in the NAAQS rulemaking with finality. See *Environmental Defense Fund* v. *Browner*, No. 98-1363 (D.C. Cir.); *Idaho Clean Air Force* v. *EPA*, Nos. 99-70289 & 99-70576 (9th Cir.).

In addition, section 172(a)(2) defines when the attainment dates in Subpart 1 are inapplicable: "This paragraph shall not apply with respect to nonattainment areas for which attainment dates are *specifically provided* under other provisions of this part." *Id.* § 7502(a)(2)(D) (emphasis added). As exceptions to the general rule of section 172, provisions containing such attainment dates must be construed narrowly. See *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989).[5]

Section 181 in Subpart 2, which was also added by the 1990 amendments, contains such "specifically provided" attainment dates: "[T]he primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." *Id.* § 7511(a)(1). The outside time limits for attainment contained in table 1 range from 3 years after November 15, 1990, in the case of areas in which the level of nonattainment is "marginal" to 20 years after November 15, 1990, in the case of areas in which the level of nonattainment is "extreme." *Id.*

Section 181(a)(1), however, provides only "the *primary standard* attainment date." 42 U.S.C. § 7511(a)(1) (emphasis added). Because attainment dates for the secondary standards are not "specifically provided" in section 181 or elsewhere in Subpart 2, the attainment of such standards is governed by the general provisions of section 172(a)(2) in Subpart 1. Thus, nothing in section 181 can constrain EPA's authority to require attainment of the secondary standards "as expeditiously as practicable." In

---

[5] Thus, this is not a situation in which the statute contains a general provision and a specific provision but does not specify how they interrelate. The canon that "the specific governs the general" is therefore inapplicable. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

granting in part the petition for rehearing, the D.C. Circuit recognized as much, retracting an inconsistent conclusion in the original panel opinion: "Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS 'as expeditiously as practicable.' " Pet. App. 80a-81a.

Moreover, the attainment dates in section 181 apply to only one primary standard for ozone: the 1-hour primary standard of 0.12 ppm, which was the only ozone NAAQS in effect in 1990 at the time section 181 was added to the Clean Air Act. See 44 Fed. Reg. 8202 (1979) (codified at 40 C.F.R. § 50.9(a)). Indeed, the outside time limits for attainment contained in table 1 classify nonattainment areas by reference to the amount by which their ambient air quality levels – referred to as "design value[s]" in the statute – exceed the 0.12 ppm standard. See 42 U.S.C. § 7511(a)(1). So, for example, if EPA were to revise the 1-hour standard to 0.10 ppm, the outside time limits for areas with design values between 0.10 ppm and 0.12 ppm simply could not be determined on the basis of table 1, since the table does not provide such time limits – "specifically" or otherwise – for areas with concentration below 0.12 ppm.

Even with respect to areas with design values higher than 0.12 ppm, the congressional balancing between environmental protection and economic growth reflected in the outside time limits for attainment in table 1 would no longer be applicable. This balancing was performed for a standard of 0.12 ppm and would not necessarily be the same if subsequent information, giving rise to the promulgation of the more stringent standard of 0.10 ppm, revealed that the environmental problem was more serious than was known at the time of the adoption of the 0.12 ppm standard.

There is another reason why the scheme in section 181 cannot apply to the standard under review. The 0.12 ppm standard in effect at the time of the 1990 amendments used a 1-hour averaging period. 44 Fed. Reg. at 8218. (For this reason, it is referred to as the 1-hour standard.) In contrast, the NAAQS under review uses an 8-hour averaging period. 62 Fed. Reg. at 38,861-63. The ambient air quality levels computed under these different averaging periods are not directly comparable.

As indicated in Part III.B, *supra*, if two ambient standards prescribe the same maximum permissible concentration but have different averaging periods, the standard with the longer averaging period is the less stringent one. Lower concentrations during part of the longer period can offset higher concentrations during another part of that period in a way that would not be possible if the averaging period were shorter. If after section 181 was enacted, EPA had retained the 0.12 ppm level but extended the averaging period to 8 hours, there is no reason to believe that Congress would have wanted to apply the outside time limits set forth in section 181 to these less stringent standards. It might, for example, have believed that the less stringent standards should be attained in shorter time periods.

The D.C. Circuit's principal argument in support of its conclusion that section 181 in Subpart 2 constrains EPA's authority to implement the 8-hour standard of 0.08 ppm is wholly without merit. According to the D.C. Circuit, great weight must be placed on the fact that section 181(a)(1) in Subpart 2 makes a reference to section 107(d), 42 U.S.C. § 7407(d): "Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, . . . based on the

design value for the area." 42 U.S.C. § 7511(a)(1); see Pet. App. 37a-43a, 79a-80a. The D.C. Circuit reasoned that if section 181 was intended to apply only to the NAAQS for ozone in effect at the time of the 1990 amendments, the reference in section 181 would have been, instead, to section 107(d)(1)(C) and (d)(4). See Pet. App. 38a-42a, 79a-80a. Both section 107(d)(1)(C) and (d)(4) deal with the designation of nonattainment areas immediately following the 1990 amendments: section 107(d)(1)(C) applies generally whereas section 107(d)(4) specifically covers ozone. See 42 U.S.C. § 7407(d)(1)(C), (d)(4).

The argument conerning the reference to section 107(d) is far from convincing because it would strain neither logic nor the English language to read the reference to section 107(d) as applying only to the portions of section 107(d) that are relevant to the setting of the attainment dates under section 181. For example, it would not be unnatural to say that section 110 of the Clean Air Act constrains interstate pollution that contributes to the nonattainment of the NAAQS when in fact this requirement is to be found in section 110(a)(2)(D)(i)(I). See 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Moreover, as the preceding discussion shows, the application of section 181 to ozone NAAQS other than the 1-hour 0.12 ppm standard in effect at the time of the 1990 amendments would give rise to a number of illogical results. The reference to section 107(d) cannot trump the analysis showing why section 181(a)(1) does not "specifically provide[ ]" attainment dates for other ozone NAAQS, particularly since there is a plausible interpretation of this reference that avoids such illogical results. Neither should this reference be read to stand in the way of EPA's authority to implement standards that it revises, pursuant to congressional direction, under section 109(d).

Finally, a more searching statutory inquiry wholly disposes of the D.C. Circuit's core argument. Section 172, like section 181, refers to the "designation of an area as a nonattainment area pursuant to section 7407(d)." 42 U.S.C. § 7502(a)(1)(A); see *id.* § 7502(a)(2)(A). But, the references to section 107(d) designations in section 172 cannot possibly refer to section 107(d)(1)(C) and (d)(4), which apply to the designations for the 1-hour ozone standard in effect at the time of the 1990 amendments. Unquestionably, the classifications and corresponding attainment dates for the pre-existing 1-hour 0.12 ppm ozone NAAQS are "specifically provided" for these areas in section 181 of Subpart 2.

Therefore, the reference to section 107(d) contained in section 172 cannot refer to all of section 107(d). Instead, it must refer only to those portions of section 107(d) that are relevant to the establishment of attainment dates under section 172: section 107(d)(1)(A), (B) and (d)(3). See 42 U.S.C. § 7407(d)(1)(A), (B), (d)(3). It follows that the reference to section 107(d) contained in section 181 should be interpreted, in the same way, to mean only the portions of section 107(d) – namely, subsections (d)(1)(C) and (d)(4) – that are relevant to the establishment of attainment dates under section 181.

The D.C. Circuit correctly invoked the standard canon of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " Pet. App. 80a (citing *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995)). But the D.C. Circuit erred in applying the canon: the only way that the references to section 107(d) in section 172 and 181 can be given the same meaning is by interpreting these references to apply only to the portions of section 107(d) that

are relevant for the establishment of the attainment dates under the respective provisions.

In summary, an understanding of the structure of the nonattainment provisions of the Clean Air Act compels the conclusion that section 181 does not constrain EPA's authority to implement the 8-hour standard of 0.08 ppm promulgated in 1997. At the very least, it follows that EPA's interpretation to that effect is permissible and not inconsistent with the clear intent of Congress. See 62 Fed. Reg. at 38,884-85. Thus, *Chevron*, 467 U.S. at 842-43, requires courts to accord deference to this interpretation.

CONCLUSION

For the foregoing reasons the judgment of the D.C. Circuit should be reversed. The promulgation of the NAAQS for ozone and particulate matter did not give rise to any nondelegation problems and nothing in section 181 constrains EPA's authority to implement the ozone standard.

Respectfully submitted.

RICHARD L. REVESZ
Counsel of Record

VICKIE PATTON
ANN BREWSTER WEEKS
Counsel for Amici Curiae
Environmental Defense, et al.

July 21, 2000

21

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

No. 99-1257

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Respondent Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

CHARLES FRIED
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
Counsel for Respondents American Trucking Associations, Inc. and Chamber of Commerce of the United States

*Additional Parties and Counsel Listed on Inside Cover

September 11, 2000

BEST AVAILABLE COPY

10500

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act").

2. Whether the Court of Appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the Court of Appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

RULE 29.6 STATEMENT

The respondents joining this brief are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these respondents has any parent corporations, and no publicly traded company owns 10 percent or more of any of these respondents' stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

PERTINENT STATUTORY AND REGULATORY PROVISIONS 2

COUNTERSTATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. NONDELEGATION CONCERNS REINFORCE THAT THE CLEAN AIR ACT REQUIRES A COMMON SENSE BALANCING OF COMPETING FACTORS IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS 7

A. The Administrator, Bound by *Lead Industries*, Effectively Concedes Here the Absence of the Sort of Intelligible Principle Previously Accepted by This Court in Ratemaking and Similar Cases Presenting Questions of Degree 11

B. The Administrator Cannot Escape Her Concession That There Was No Intelligible Principle Here by Attempting to Rewrite the Record 15

C. Repudiating *Lead Industries* and Requiring Consideration of Competing Factors in Setting NAAQS Will Supply the Missing Intelligible Principle and Resolve the Nondelegation Problem 21

II. THE COURT OF APPEALS' IMPLEMENTATION HOLDING IS CORRECT, BUT NEED NOT BE REACHED BY THIS COURT. 25

A. The Court of Appeals Correctly Held that Subpart 2 Applies to Implementation of All Ozone NAAQS, Including Revised Ozone NAAQS, Thus Effectively Precluding Implementation of the Ozone NAAQS Under Review Here 25

1. The Text of Subpart 2 Unambiguously Encompasses Implementation of All Ozone NAAQS 26

2. The Statutory Structure and Legislative History Confirm that Subpart 2 Governs Implementation of All Ozone NAAQS 32

3. Congress' Carefully Crafted Statutory Regime Does Not "Lead to Unworkable and Absurd Results." 38

B. Although the Subpart 2 Issues Are Ripe for Review, The Court Nonetheless May Decline to Decide Them 41

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases:

Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971) 23, 24

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 17

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 10, 12

Association of Inv. Brokers v. SEC, 676 F.2d 857 (D.C. Cir. 1982) 46

AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1993) 44

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 10, 17

Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944) 47

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 17

California v. Rooney, 483 U.S. 307 (1987) 47, 48

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 26, 45

Christensen v. Harris County, 120 S. Ct. 1655 (2000) 22

City of Santa Rosa v. EPA,
534 F.2d 150 (9th Cir.), *vacated sub nom. Pacific Legal Found. v. EPA*,
429 U.S. 990 (1976) 36

Clinton v. City of New York,
524 U.S. 417 (1998) 10

Coalition for Clean Air v. Southern Cal. Edison Co.,
971 F.2d 219 (9th Cir. 1992) 37

Dole v. United Steelworkers of Am.,
494 U.S. 26 (1990) 32

EPA v. Brown,
431 U.S. 99 (1977) 36

Ethyl Corp. v. EPA,
541 F.2d 1 (D.C. Cir. 1976) 20

Fahey v. Mallone,
332 U.S. 245 (1947) 10

FDA v. Brown & Williamson Tobacco Corp.,
120 S. Ct. 1291 (2000) 22

FEA v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 9

FPC v. Hope Natural Gas,
320 U.S. 591 (1944) 4, 13, 14, 16

Hahn v. United States,
524 U.S. 236 (1998) 46

Hoctor v. United States Dep't of Agric.,
82 F.3d 165 (7th Cir. 1996) 13

ICC v. Goodrich Transit Co.,
224 U.S. 194 (1912) 14

Industrial Union Dep't v. American Petroleum Inst.,
448 U.S. 607 (1980) 6, 9, 23

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 36

International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA,
938 F.2d 1310 (D.C. Cir. 1991) 3, 6, 22, 23

J.W. Hampton & Co. v. United States,
276 U.S. 394 (1928) 10, 13, 16

Kent v. Dulles,
357 U.S. 116 (1958) 12

Lichter v. United States,
334 U.S. 742 (1948) 14

Loving v. United States,
517 U.S. 748 (1996) 8

Mahoney v. Babbitt,
113 F.3d 219 (D.C. Cir. 1997) 46

MCI v. AT&T,
512 U.S. 218 (1994) 22

Mistretta v. United States,
488 U.S. 361 (1989) 8-10, 23

Montana v. Crow Tribe of Indians,
523 U.S. 696 (1998) 46

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 26, 31

Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 23

National Cable Television Ass'n v. United States,
415 U.S. 336 (1974) 10, 23

New York Trust Co. v. Eisner,
256 U.S. 345 (1921) 38

Pearson v. Shalala,
164 F.3d 650 (D.C. Cir. 1999) 17

Pennsylvania Dep't of Corrections v. Yeskey,
524 U.S. 206 (1998) 31

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 18

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 46

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 14

Texas v. Hopwood,
518 U.S. 1033 (1996) 47

Touby v. United States,
500 U.S. 160 (1991) 12

United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.,
282 U.S. 311 (1931) 12

Webster v. Doe,
486 U.S. 592 (1988) 12

Williams Gas Processing-Gulf Coast Co. v. FERC,
145 F.3d 377 (D.C. Cir. 1998) 47

Yakus v. United States,
321 U.S. 414 (1944) 8, 14

Statutes:

Administrative Procedure Act,
5 U.S.C. § 551(4) 12

Administrative Procedure Act,
5 U.S.C. § 551(6) 12

Clean Air Act § 107(b-d),
42 U.S.C. § 7407(b-d) 26

Clean Air Act § 107(d)(1)(A),
42 U.S.C. § 7407(d)(1)(A) 28

Clean Air Act § 107(d)(1)(A)(iii),
42 U.S.C. § 7404(d)(1)(A)(iii) 39

Clean Air Act § 107(d)(1)(B)(i),
42 U.S.C. § 7407(d)(1)(B)(i) 28

Clean Air Act § 107(d)(4)(A)(i),
42 U.S.C. § 7407(d)(4)(A)(i) 31

Clean Air Act § 109(d)(1),
42 U.S.C. § 7409(d)(1) 39

Clean Air Act § 110(a)(2)(A),
42 U.S.C. § 7410(a)(2)(A) 36

Clean Air Act § 116,
42 U.S.C. § 7416 40

Clean Air Act § 172(a)(1, 2),
42 U.S.C. § 7502(a)(1, 2) 37

Clean Air Act § 172(a)(1)(A),
42 U.S.C. § 7502(a)(1)(A) 26, 27, 30

Clean Air Act § 172(a)(1)(C),
42 U.S.C. § 7502(a)(1)(C) 27, 30

Clean Air Act § 172(a)(2)(A),
42 U.S.C. § 7502(a)(2)(A) 27

Clean Air Act § 172(a)(2)(D),
42 U.S.C. § 7502(a)(2)(D) 27

Clean Air Act § 181(a)(1),
42 U.S.C. § 7511(a)(1) 27, 28, 33, 37, 41

Clean Air Act § 181(a)(4, 5),
42 U.S.C. § 7511(a)(4, 5) 34

Clean Air Act § 181(b)(1),
42 U.S.C. § 7511(b)(1) 34

Clean Air Act § 181(b)(2, 4),
42 U.S.C. § 7511(b)(2, 4) 34

Clean Air Act § 181(b)(4)(D),
42 U.S.C. § 7511(b)(4)(D) 33

Clean Air Act § 181(c)(3),
42 U.S.C. § 7511(c)(3) 40

Clean Air Act § 182,
42 U.S.C. § 7511a 34

Clean Air Act § 182(c)(5),
42 U.S.C. § 7511a(c)(5) 34

Clean Air Act § 182(e)(3),
42 U.S.C. § 7511a(e)(3) 34

Clean Air Act § 183(g),
42 U.S.C. § 7511b(g) 33

Clean Air Act § 185,
42 U.S.C. § 7511d 34

Clean Air Act § 186(a),
42 U.S.C. § 7512(a) 32

Clean Air Act § 186(a)(1),
42 U.S.C. § 7512(a)(1) 29

Clean Air Act § 188(a)(1),
42 U.S.C. § 7513(a)(1) 29

Clean Air Act § 191(a)(1),
42 U.S.C. § 7514(a)(1) 29

Pub. L. 95-95, 91 Stat. 691 (Aug. 7, 1977) 37

Pub. L. 101-549, 104 Stat. 2339,
§ 711(b) (Nov. 15, 1990) 40

U.S. CONSTITUTION, Art. I, § 1 7

U.S. CONSTITUTION, Art. I, § 8, cl. 17 7

Miscellaneous:

36 Fed. Reg. 8,186 (Apr. 30, 1971) 36

55 Fed. Reg. 35,625 (Aug. 31, 1990) 31

56 Fed. Reg. 56,694 (Nov. 6, 1991) 31

58 Fed. Reg. 51,735 (Sept. 30, 1993) 23

61 Fed. Reg. 65,716 (Dec. 13, 1996) 42, 43

62 Fed. Reg. 38,421 (July 18, 1997) 44

62 Fed. Reg. 38,652 (July 18, 1997) 4, 5, 11, 17, 19, 20

62 Fed. Reg. 38,856 (July 18, 1997) 4, 11, 43, 44

63 Fed. Reg. 31,014 (June 5, 1998) 44

63 Fed. Reg. 39,432 (July 22, 1998) 44

64 Fed. Reg. 30,911 (June 9, 1999) 44

H.R. 3030, 101st Cong. § 104 (1989),
reprinted in II Senate Comm. on Env. and
Public Works, 103d Cong.,
Legislative History of the Clean Air
Act Amendments of 1990 (1993) 32, 35

H.R. Rep. No. 101-490, pt. 1, at 145-48 (1990),
reprinted in II 1990 Legislative History 33

S. 1630, 101st Cong. § 101 (1990),
reprinted in III 1990 Legislative History 35, 36

S. Rep. No. 101-228, at 10-12 (1989),
reprinted in V 1990 Legislative History 33, 38

Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399 (2000) 24

David Currie, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1995) 8

THE FEDERALIST NO. 47 (Clinton Rossiter ed., 1961) 8

Lon Fuller, THE MORALITY OF THE LAW (rev. ed. 1964) 1

National Research Council, RETHINKING THE OZONE PROBLEM IN URBAN & REGIONAL AIR POLLUTION (1991) 37

Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE (1990) 17

Kenneth F. Rothman, *et al.*, MODERN EPIDEMIOLOGY (1998) 21

Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999) 5, 18

WORKS OF THOMAS JEFFERSON (P. Ford ed. 1904) 8

INTRODUCTION

The constitutional scholar Thomas Reed Powell has said, "if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind." Quoted in Lon Fuller, THE MORALITY OF THE LAW 4 (rev. ed. 1964). The Administrator's brief is a stunning display of the legal mind. The D.C. Circuit's holding that the Administrator's ozone and particulate matter ("PM") National Ambient Air Quality Standards ("NAAQS") violated the Constitution depended upon—indeed, was inextricably bound up in—the *Lead Industries* doctrine that says she may not consider costs and other non-health factors in setting those standards. Yet, the Administrator's brief nowhere even mentions the relationship of that doctrine to the nondelegation holding below. That omission is telling, for it was only the frank irrationality of *Lead Industries* which produced the constitutionally fatal indeterminancy in the Administrator's exercise of her authority.

The Administrator points to many aspects of the Clean Air Act ("CAA" or "Act")—particularly the elaborate procedures she must follow and the consultation she must engage in before setting standards, and the statutory injunction that she is to set those standards at levels "requisite to protect the public health" with an "adequate margin of safety." Understood in a natural and reasonable way as explained in our brief as cross-petitioners, this statutory text provides a level of specificity that may be deemed constitutionally adequate under this Court's decisions. But the Administrator, constrained by *Lead Industries*, does not (and may not) understand those terms in a natural and reasonable way. Without the bizarre gloss of *Lead Industries,* those criteria would make quite enough noise to register on constitutional ear drums. But constrained by *Lead Industries*, they make as much noise as one hand clapping. The Court of Appeals reached its conclusion only because, if the Act is interpreted to include a prohibition on considering costs (including costs to health), terms like "requisite to protect the public health" and "adequate margin of safety" are not just

vaguer and less determinate than they might be—they are demonstrably, and as a matter of logic, wholly indeterminate. This is, therefore, a rare, perhaps unique case in the jurisprudence of the constitutional delegation doctrine. It is that rare case where the general terms of the delegation have been rendered meaningless by the lower court. And it is only because of *Lead Industries* that this is so. Because she refuses to come to grips with that fundamental fact, the Administrator's brief is quite literally beside the point.

The Administrator also complains in Part I.B of her brief that the Court of Appeals, in remanding the case to her, misused the nondelegation doctrine to achieve inappropriate judicial oversight of her administrative prerogatives. On the premise that *Lead Industries* states the definitive interpretation of the Act, the court below was correct that the Act provides the Administrator no coherent guidance and therefore violates the Constitution. Perhaps the Court of Appeals might have left it at that, but, keeping in mind the teachings of *Chevron*, that court cautiously remanded to the Administrator so that she could have a last opportunity to attempt a constitutional interpretation. Certainly the lower court should not be faulted for taking such a deferential stance. But if, as we request in our brief as cross-petitioners, this Court finally dispatches the misbegotten *Lead Industries* doctrine, the Administrator would also be free to set new ozone and PM standards, albeit free of the entirely irrational constraints of *Lead Industries*. In short, the Court of Appeals, though hobbled by *Lead Industries*, employed an entirely conventional remedy under the circumstances.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions that are central to the Administrator's NAAQS standard-setting authority are set forth in the Appendix to our cross-petitioners brief. *See* Cross-Pet. App. 1a-16a. The portions of the Clean Air Act central to the Subpart 2 issues are set forth in the Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

Respondents rest on the Statement provided in their brief as cross-petitioners. *See* Cross-Pet. Br. 2-25. The orders and opinions below and the bases of this Court's jurisdiction are found at page 2 of that brief.

SUMMARY OF THE ARGUMENT

Lead Industries spawned the nondelegation holding below. Under the governance of *Lead Industries,* the Administrator had but two options when setting the ozone and PM NAAQS: she could adopt a "zero-risk policy" setting the "permissible levels of both pollutants here at zero" *or* she could select a non-zero standard without considering the relevant factors that might counsel in favor of or against any particular NAAQS. *See* Pet. App. 15a; Cross-Pet. Br. 29. The Court of Appeals recognized that the nondelegation concerns presented by each of these options would disappear if the Administrator were only able to employ "cost-benefit analysis," which that court had defined in an earlier case as "'only a systematic weighing of the pros and cons.'" Cross-Pet. Br. 30 (quoting *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991) ("*Lockout/Tagout I*")). And, while remanding to the Administrator in light of *Chevron*, the Court of Appeals nonetheless expressed doubt that any constitutional interpretation of the statute was possible under the *Lead Industries* doctrine. *See* Pet. App. 18a.

Several of this Court's recent decisions, though not expressly predicated on nondelegation concerns, would appear to rule out both available options discussed by the Court of Appeals (a zero-risk standard or an arbitrarily-selected non-zero standard) and thus doom *Lead Industries*. *See* Cross-Pet. Br. 25, 31-32, 47. The Act's text, structure and purpose likewise

confirm that *Lead Industries* was wrongly decided. *See id.* at 32-43. The correctness of that conclusion is reinforced both by the need for transparency in the agency decisionmaking process, *see id.* at 43-47, and by the requirements of effective executive, congressional and judicial oversight of the Environmental Protection Agency's ("EPA's" or "the Agency's") standard-setting, *see id.* at 47-50.

For all of these reasons, it is simply impossible to consider the Court of Appeals' nondelegation holding in isolation from *Lead Industries*. With that reservation stated, we nonetheless demonstrate below that the reasoning of the Court of Appeals both underscores the error of *Lead Industries* and stands as an independent basis for reversing EPA's ozone and PM NAAQS.

The nondelegation doctrine flourishes in the soil of constitutional bedrock. It requires, especially in cases involving regulations that affect the whole economy, that the elected Congress provide an "intelligible principle" governing the exercise of unelected agency officials' discretion. Here, however, the Administrator disclaimed any need to accept a governing principle at all, saying instead that her NAAQS decisionmaking was "largely judgmental in nature" and reflected "no generalized paradigm," thus conceding the absence of the requisite intelligible principle. *See* 62 Fed. Reg. 38,652, 38,688 (July 18, 1997); 62 Fed. Reg. 38,856, 38,883 (July 18, 1997). Her refusal under the *Lead Industries* doctrine to weigh competing factors also cannot be squared with this Court's nondelegation precedents which presuppose a balancing of logically relevant factors in ratemaking and similar contexts in which questions of degree must be administratively resolved. *See, e.g., FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944) ("[T]he fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). *See* Part I.A, *infra*.

The Administrator has no answer to these points other than to say that Congress imposed multiple specific restrictions on

EPA—for instance, "a body of experts that EPA is to consult and procedures that EPA must follow"—and that the court below somehow demanded that "EPA demonstrate that the numerical standard the agency selected was the sole possible choice." EPA Br. 25, 30. These are red herrings. The "intelligible principle" requirement means a *substantive* constraint on the agency's exercise of discretion, not simply a *procedure* to follow, even though that constraint need not be (and usually is not) a rule that preordains the selection of a unique outcome. All that is required is a standard against which the agency's exercise of discretion can be tested—for example, the balancing of relevant factors in *Hope Natural Gas*, or the "systematic weighing" of competing considerations (including costs) that the Act requires here. *See* Cross-Pet. Br. 30, 32-50. By contrast, the Administrator consistently disclaimed "any single approach" below and argued that everything depends "upon the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. at 38,688, 38,883. But such purely *ad hoc* decisionmaking provides no intelligible principle and leads inevitably, as here, to "minimally informative generalities" that do "not explain[], in concrete terms, why [she] chose one level of regulation rather than another." Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 327, 330 (1999). The Administrator perhaps belatedly recognizes this fatal flaw, as she hints that she wishes that it were possible to find a guiding principle by characterizing both ozone and PM as "threshold" pollutants. *See* EPA Br. 31. In fact, the record is clear that EPA made no such findings below, *see* Cross-Pet. Br. 6-7 (ozone), 14-16 (PM), a point the Administrator herself repeatedly underscored in both the rulemakings themselves and her D.C. Circuit briefing. *See, e.g.*, Resp. Br. in D.C. Cir. No. 97-1440, at 34, 119 (PM standards, like ozone standards, "could not be risk-free" and "cannot eliminate all risk to public health."). *See* Part I.B, *infra*.

As the D.C. Circuit recognized in *Lockout/Tagout I*, no more than the "prudential algebra" of Ben Franklin—"a systematic weighing" of competing considerations (including costs)—is required to resolve the nondelegation problems identified below. *See* 938 F.2d at 1321. That outcome, required by the Act for the reasons detailed in our brief as cross-petitioners, would obviate any need for aggressive judicial construction (as in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*")), while leaving EPA with a wide scope of discretion in setting NAAQS. The Court of Appeals' remand remedy, though fashioned within the shackles of *Lead Industries*, appropriately recognized that the Agency should decide in the first instance interpretative issues not resolved by Congress. Accordingly, once *Lead Industries* is rejected, many issues (apart from the central question of whether the Act requires a balancing of competing factors in setting NAAQS) will remain for EPA to resolve in the next round of ozone and PM rulemakings. *See* Part I.C, *infra*.

The Court of Appeals' Subpart 2 implementation holding is also correct, even though the Court may elect not to reach it. Congress enacted the detailed Subpart 2 classifications, attainment dates and control strategies for the ozone NAAQS precisely in order to deprive the Administrator of the implementation discretion her predecessors had previously exercised (so unsatisfactorily in Congress' view) over the previous two decades. The plain language, structure, drafting history and context all confirm that Subpart 2's long-term blueprint for bringing the Nation into ozone attainment was meant to last—certainly it is not the "drafting error that the EPA's interpretation implies." Pet. App. 39a. *See* Part II.A, *infra*. The Subpart 2 issue was also unquestionably ripe for decision by the Court of Appeals, since the Administrator promulgated her final decision on Subpart 2 as a key element of the rulemaking. *See* Part II.B.1, *infra*. Nonetheless, this Court may properly elect not to address the Subpart 2 issue for

the quite different reason that the Administrator's arguments go to the rationale of the decision below—not its ultimate result. *See* Part II.B.2, *infra*.

ARGUMENT

The argument presented in this brief is necessarily provisional. As detailed in our brief as cross-petitioners, *Lead Industries* was wrongly decided, and the Act requires a weighing of competing factors in setting NAAQS. That required weighing of factors is all that is needed for those provisions of the Act to pass constitutional muster. Nonetheless, the arguments presented below serve to deepen the reasons why *Lead Industries* is wrong and provide an alternative basis for decision if the Court were to affirm the *Lead Industries* doctrine. Part II below separately addresses the so-called Subpart 2 implementation issue and shows why the Court of Appeals' resolution of that issue was both fundamentally right and ripe for decision.

I. NONDELEGATION CONCERNS REINFORCE THAT THE CLEAN AIR ACT REQUIRES A COMMON SENSE BALANCING OF COMPETING FACTORS IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS.

While the issue may become academic if this Court rejects *Lead Industries*, the nondelegation doctrine is far more substantial and nuanced than the Administrator's brief pretends. The Constitution provides that "*[a]ll* legislative powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. Art. I, § 1 (emphasis added); *see also id.* § 8, cl. 17 ("The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). The first three Articles thus carefully distinguish between "legislative powers," Art. I, § 1, "executive power," Art. II, § 1, and "judicial power," Art. III, § 1, and divide them separately among the three

branches. The resulting rule forbidding delegations of legislative power—the nondelegation doctrine—reflects the "central judgment of the Framers of the Constitution that, within our political scheme, the separation of government powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). As Madison warned, "'[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.'" THE FEDERALIST NO. 47, at 303 (Clinton Rossiter ed., 1961) (quoting Montesquieu; emphasis omitted). The resulting threats to liberty are not always obvious. *See, e.g.*, David Currie, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 125-34 (1995).

The Court has recognized nonetheless that this nondelegation principle must be tempered where it comes into tension with the Nation's paramount interest in having a government capable of meeting the needs of modern society. As Thomas Jefferson observed, "[n]othing is so embarrassing nor so mischievous in a great assembly as the detail of execution." 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904). Thus, "[t]o burden Congress with *all* federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Loving v. United States*, 517 U.S. 748, 758 (1996) (emphasis added). Needless to say, however, this competing principle of governmental necessity has not eliminated the nondelegation doctrine, nor lessened the importance of the liberty concerns underlying its constitutional role.

The Court has often accepted broad delegations. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 422-23 (1944) (wartime price controls); *Loving*, 517 U.S. at 772-73 (delegation to

President of authority over armed forces); *Mistretta*, 488 U.S. at 379 (delegation to courts of authority over criminal sentencing); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976) (delegation to executive branch of authority to restrict imports threatening "to impair the national security"). But it has always done so with the caveat that laws enacted by Congress must contain some substantive intelligible principle constraining any exercise of agency discretion. This is the rare case where, because of *Lead Industries*, no such constraint is present.

Mistretta is the precedent the Administrator relies on most forcefully and frequently. *See* EPA Br. 21-25. Yet, it is strikingly inapposite. *Mistretta* upheld the Sentencing Reform Act of 1984, which empowers the United States Sentencing Commission to establish sentencing guidelines. That statute provided, first of all, that those guidelines "must be consistent with the pertinent provisions [of Title 18] and could not include sentences in excess of the statutory maxima." 488 U.S. at 375. Within these constraints, the Act directed the Commission to consider seven elaborate and confining criteria as a means of first, reducing the "serious disparities in sentences" detailed in the Senate Report, and then, formalizing the previously unfettered discretion of trial judges under the Title 18 limits. *Id.* at 365, 375. Finally, the Act supplemented these criteria with a number of specific directives requiring, for example, "a term of confinement at or near the statutory maximum for certain crimes" and "a substantial term of imprisonment [for] a third felony conviction." *Id.* at 376-77.

Broad delegations are most problematic under the Court's decisions where, as here, the delegatee agency issues regulations that drastically affect the whole economy. *See, e.g.*, *Benzene*, 448 U.S. at 645 (plurality opinion) ("it is unreasonable to assume the Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *id.* at 675

(Rehnquist, J., dissenting) (statute failed to satisfy constitutional standards "[e]specially in light of the importance of the interests a stake"); *Fahey v. Mallone*, 332 U.S. 245, 250 (1947) (delegations conferring power over "unprecedented economic problems of varied industries" must be more precise than those regarding "a single type of enterprise"); *Clinton v. City of New York*, 524 U.S. 417, 487 (1998) (Breyer, J., dissenting) (delegation may be less precise where it does not concern "the entire economy"). The problematic character of such economy-wide delegations is further heightened where courts (as in *Lead Industries*) render otherwise constitutionally acceptable text meaningless, or where agencies seek to do likewise under an overly expansive reading of their own authority under this Court's *Chevron* doctrine. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

The verbal formula devised by the Court for dividing permissible from impermissible delegations is that Congress itself "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise delegated authority] is directed to conform." *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (Taft, C. J.) (emphasis added). The required intelligible principle may be drawn not only from statutory text, but also from "the purpose of the Act, its factual background, and the statutory context." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). When such a principle is not apparent from these sources, the Court has not hesitated to "giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene* and *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) ("*NCTA*")).

As demonstrated below, the Administrator, bound as she was by *Lead Industries*, effectively concedes that no such intelligible principle governed her standard-setting here. All her attempts to manufacture such a principle before this Court

are doomed by the record below and by the fact that no constitutionally acceptable standard governing the exercise of discretion is possible without consideration of the competing factors barred from consideration by *Lead Industries*. By contrast, the nondelegation problem that produced the decision below is readily resolved by rejecting *Lead Industries* and allowing the Administrator to formulate new ozone and PM NAAQS constrained only by the requirement that she overtly and systematically consider all logically relevant factors in setting those standards.

A. The Administrator, Bound by *Lead Industries*, Effectively Concedes Here the Absence of the Sort of Intelligible Principle Previously Accepted by This Court in Ratemaking and Similar Cases Presenting Questions of Degree.

Perhaps understandably in light of *Lead Industries*, the Administrator consistently has refused to give any definite meaning to the key statutory terms, saying, for example, that she "is not limited to any single approach to determining an adequate margin of safety. . . ." 62 Fed. Reg. at 38,688, 38,883. Moreover, she admits that her decisions were "largely judgmental in nature" and did not follow any "generalized paradigm" such as determining "what risk is 'acceptable'" through quantification "or any other metric." *Id.* Before the Court of Appeals, she continued to insist that "nothing in the statute requires her to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." Resp. Br. in D.C. Cir. No. 97-1441, at 43 (emphasis added). Put most charitably, the Administrator did what she thought best.

But that is precisely what troubled the Court of Appeals. *See* Cross-Pet. Br. 28-30. Given *Lead Industries* and accepting her appraisal that it is "'possible, but not certain' that health effects exist" at every level, the Administrator's standard-setting criteria become entirely indeterminate unless she chooses "a standard of zero." Pet. App. 10a-12a (quoting 62

Fed. Reg. at 38,678). To our knowledge no official (at least none outside the foreign policy arena) has ever claimed such regent authority. *Compare Kent v. Dulles*, 357 U.S. 116 (1958); *Webster v. Doe*, 486 U.S. 592 (1988). Nor has such an assertion of authority ever been sustained—especially as applied in an economy-wide regulatory context—under this Court's decisions which require a substantive "standard," *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 282 U.S. 311, 324 (1931), or similar "constraint" on the agency's exercise of "discretion." *Touby v. United States*, 500 U.S. 160, 165 (1991).

It is not hard to perceive in this Court's nondelegation decisions a distinction between dichotomous (either/or) determinations (the sort that often result in an "order" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(6)) and those agency determinations which have general and prospective effect (the sort that more typically produce "rules" within the APA's parlance, 5 U.S.C. § 551(4)). In the former category, the Court often has not expressly discussed the specific considerations that weigh on alternative sides of the question of whether a license should be granted or denied, or a specific practice permitted or forbidden. In *American Power & Light Company v. SEC*, for example, the Court assumed utility holding-company structures were permissible except in cases where they would "unduly or unnecessarily complicate the structure" or "inequitably or unfairly distribute voting power among security holders." 329 U.S. at 104. Without expressly addressing the factors that must be balanced in making that determination, the Court rejected a nondelegation challenge, saying that "these standards" derive "much meaningful content from the purpose of the Act, its factual background and the statutory context," and that "[f]rom these sources," as well as the "manifold evils revealed by the legislative investigations," "a veritable code of rules reveals itself for the Commission to follow." *Id.* at 104-05.

This Court's nondelegation decisions, however, reflect a greater need to weigh competing considerations when an agency is making determinations of prospective effect, especially ones involving setting numeric values, including rates, prices or import duties. No doubt, this greater need for consideration of competing factors derives in part from the fact that setting numeric levels is quintessentially "legislative." *Cf. Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 170-71 (7th Cir. 1996) (Posner, J.) (selection of a specific number is "a legislative function"). But just as important, as the Court of Appeals recognized, is the fact that the question in these cases (including NAAQS standard-setting) is inherently "one of degree." Pet. App. 11a. In ratemaking and similar numeric rulemakings, agencies invariably retain flexibility in fixing the right "stopping point" along the road but, to continue the automotive metaphor, there must always be both a gas pedal and brake in making that determination. *See id.*

This Court's nondelegation decisions in ratemaking and analogous numeric standard-setting contexts thus consistently reflect this need to balance competing considerations. In *FPC v. Hope Natural Gas Company*, for instance, the Court rejected a nondelegation challenge because "the fixing of 'just and reasonable' rates . . . involves a *balancing* of the investor and the consumer interests." 320 U.S. 591, 603 (1944) (emphasis added). Consumers are thus entitled to "reasonable" rates, while regulated entities must be permitted to recover revenue to offset costs, including "revenue not only for operating expenses but also for the capital costs of the business." *Id.*

This same principle also holds in contexts where proxy economic variables are used as a means of balancing the competing interests. In *J.W. Hampton*, for example, the Court sustained as "intelligible" a delegation to the President of authority to set import duties "equal" to the difference between domestic and foreign costs of production. 276 U.S. at 404-05. To the same effect are this Court's decisions rejecting

nondelegation challenges when agencies set prices by determining the cost of production. *See, e.g. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (upholding delegation to set coal prices yielding a "fair return" based on measures of cost); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912) (upholding authority of ICC to set rates of interstate carriers based on assessment of the cost of service). Still other cases endorse even more complex cost or price measurements. *See, e.g., Lichter v. United States*, 334 U.S. 742, 793-802 (1948) (upholding delegation to recoup excess wartime profits by reference to measurements of costs). Even the very broad delegation in *Yakus* comported with this model since the Price Administrator was required to consider both base-period prices and (again, contrary to *Lead Industries*) costs. *See* 321 U.S. at 421.

The principle underlying these decisions is obvious. If, by analogy to *Lead Industries*, a lower court in *Hope Natural Gas* had ruled that the Federal Power Commission ("FPC") were barred from considering production costs or the interests of suppliers in setting "just and reasonable" rates, then there would have been no rational basis for setting those rates above zero since consumers always benefit incrementally from lower and lower rates. Under that hypothetical, a very different nondelegation challenge would have been presented, but there can be little doubt that this Court would have resolved that challenge—not by striking down the statute—but instead by overturning the lower court decision and interpreting the statute to require a "balancing of the investor and consumer interests" just as this Court actually did in *Hope Natural Gas*. *See* 320 U.S. at 603. The same reasoning applies directly in this case and provides yet another reason for rejecting *Lead Industries*' prohibition on considering competing factors in setting NAAQS.

B. The Administrator Cannot Escape Her Concession That There Was No Intelligible Principle Here by Attempting to Rewrite the Record.

The Administrator begins the critical subpart of her brief by asserting that "Section 109 easily satisfies this Court's 'intelligible principle' standard." EPA Br. 22. That critical subpart then continues for nearly four pages, at the end of which the reader is just as puzzled as was the Court of Appeals after wrestling with similar passages in briefing below: "These sentences begged the key question about that intelligible principle: 'What is it?'" Pet. App. 73a-74a. The fault lies, of course, not so much with the Administrator but with *Lead Industries*, a decision that logically reduces the Act's statutory directives to constitutionally inaudible "one-hand clapping," by precluding consideration of all factors "on the other hand" in the setting of NAAQS. Under such circumstances, it is hardly surprising that the Administrator is reduced to various generalities like the following: "Congress has placed multiple specific restrictions on EPA's discretion in setting and revising NAAQS . . . The Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow in making its highly technical scientific judgments about the health and welfare effects of particular pollutants." EPA Br. 25 (internal quotation omitted).

What exactly does this passage mean? The reference to a "legal standard" presumably is intended to refer to the text of section 109, but, as noted previously, the Administrator has refused to give any definite meaning to the statutory terms and echoes *Lead Industries* which itself ignores the text and statutory structure in favor of snippets of legislative history. *See* Cross-Pet. Br. 33-42. As for the "factors that EPA is to consider," the Administrator must be referring to the "factors" it cited to the Court of Appeals. *See* Pet. App. 5a-6a. But these factors all point in only one direction and only restate the

"intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is 'requisite' or not requisite to 'protect the public health' with an 'adequate margin of safety,' the formula set out by § 109(b)." Pet. App. 7a.

The Administrator's intelligible principle thus reduces to an unhelpful reliance on "experts" and "procedures." But such provisions, while often useful in helping to check discretion, can serve their function only to the extent that Congress has laid down an "intelligible principle" to which the agency "is directed to conform." *J.W. Hampton,* 276 U.S. at 409. The very purpose of that required intelligible principle, of course, is to provide the essential substantive touchstone for public comments, expert advice and eventual judicial review. Indeed, the Administrator herself concedes that point when she states that the purpose of the nondelegation doctrine is to enable the judiciary to "'ascertain whether the will of Congress has been obeyed.'" EPA Br. 22 (quoting cases).

The Administrator builds a straw man when she says that the Court of Appeals demands, as the intelligible principle, "that EPA demonstrate that the numerical standard the agency selected was the sole possible choice." EPA Br. 30. Again referencing *Lockout/Tagout I*, the court below could not have been clearer that the intelligible principle required need only be "a systematic weighing" of relevant considerations—a principle entirely in keeping with the "zone of reasonableness" that confines an agency's exercise of discretion. *See* Pet. App. 14a-15a; EPA Br. 30 (relying on FPC ratemaking cases). It is precisely such a weighing of competing interests, for example, that allowed the FPC to set rates based upon a "balancing of the investor and consumer interests" under *Hope Natural Gas* and the other Federal Power Commission cases cited by the Administrator. 320 U.S. at 603. More generally, under this Court's decisions, an intelligible principle need not be a *rule* that defines precise outcomes in all circumstances; indeed, in

most circumstances it need only be a *standard* against which an agency's exercise of discretion may be tested within the rulemaking and on judicial review. *Cf.* Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 42-61 (1990) (discussing the rules/standards distinction in a variety of contexts).

The requirement of a substantive standard that serves as a constraint on agency discretion is so fundamental to our jurisprudence that the origins of this requirement are often overlooked. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 388. Such a requirement is nonetheless implicit both in the Constitution and in the Administrative Procedure Act. *See e.g., American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998) ("[T]he Administrator may well be within her authority . . . . But [she must] describe[] *the standard* under which she has arrived at this conclusion, supported by a 'plausible' explanation. . . .") (emphasis added; brackets omitted); *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (agency must "giv[e] some definitional content" to the statutory standard because "[t]o refuse to define the criteria it is applying is equivalent to simply saying no without explanation"). Indeed, without a substantive and "binding" standard to apply, as the lower court observed, there can be no "meaningful judicial review." Pet. App. 14a.

Having previously conceded that her decisions were "largely judgmental in nature" and did not follow any "generalized paradigm," 62 Fed. Reg. at 38,688, 38,883, the Administrator now claims that "[i]n each case, EPA also identified a *lower* bound for consideration at the most protective levels the scientific evidence reasonably supported." EPA Br. 31(emphasis in original). This claim hardly supplies the missing intelligible principle but it bears remembering that the Administrator may be upheld only "on the same basis articulated in the [ruling] by the agency itself," *not* on the basis of "appellate counsel's *post hoc* rationalizations." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69

(1962); *accord SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The record below confirms that EPA here offered only "minimally informative generalities" that do "not explain[], in concrete terms, why [she] chose one level of regulation rather than another." Sunstein, 98 Mich. L. Rev. at 327, 330; *see also* Pet. App. 71a-72a (referring to the same arguments made by the Administrator here as *post hoc* arguments of counsel).

Beginning with ozone, the Administrator concedes the absence of an "effects threshold" but argues that she determined that "the lower bound—0.07 ppm—was the level at which EPA's exposure assessment showed that exposures of public health concern were 'essentially zero.'" EPA Br. 31-32. The Administrator's concession of a "no effects threshold" for ozone echoes her previous statement that "it is not possible to select a level below which absolutely no effects are likely to occur." 62 Fed. Reg. at 38,863; *see* Cross-Pet. Br. 6-7 (noting similar statements in the EPA Staff Paper and by CASAC). But the more important point is the one made by the Court of Appeals—even if there *were* a *possible threshold*, that would not avoid the "indeterminancy" of the Administrator's standard-setting process unless she affirmatively determined what that threshold was and found that no health risks exist below that level. *See* Pet. App. 5a-6a. Otherwise, there always will be "'possible, but not certain'" health effects at every level, thereby producing the "same indeterminancy" that gave rise to the lower court's nondelegation holding. *Id.* at 10a-11a (quoting 62 Fed. Reg. at 38,678).

The Administrator's further claim that there are "essentially zero" ozone "exposures of public health concern" below 0.07 ppm is both circular and belied by the record. By "exposures of concern" the Administrator is referring to her own definition in the Federal Register that "exposures of concern" mean "exposures at and above 0.08 ppm, 8-hour average," 62 Fed. Reg. at 38,860, thus making her statement entirely tautological given that 0.07 ppm is less than 0.08 ppm.

Supporting her claim that 0.08 ppm has special health significance, the Administrator now claims to have "identified important and meaningful differences in the character of the scientific evidence regarding risks—including the estimated frequency and duration of adverse health effects—associated with levels above and below 0.08 ppm." EPA Br. 33. But those supposed differences do not refute the presence of health effects below the level selected by the Administrator. Nor has the Administrator ever interpreted the statute as allowing her to regulate only certain types of health risks and, as the court below noted, the Administrator "never suggested that [she] could not (or in a later rulemaking would not) base a NAAQS upon evidence . . . that revealed adverse but transient effects." Pet. App. 73a.

In the case of PM, the Administrator now argues that her newly-discovered "lower bound" consists of "the lowest level at which long-term epidemiological data indicated there *might be* an 'effects threshold' below which there is no risk of health effects." EPA Br. 31(emphasis added). As noted by the Court of Appeals, the Administrator never made an affirmative determination concerning whether PM was, or was not, a non-threshold pollutant. Pet App. 6a. But that fact only confirms the "indeterminancy" in the Administrator's standard-setting which (together with *Lead Industries*) elicited the non-delegation holding below. *See id.* For unless the Administrator affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point, there always will be "'possible, but not certain'" health effects at every level. *Id.* at 11a-12a (quoting 62 Fed. Reg. at 38,678). It is for this very reason that the PM Staff Paper found that PM presents a "continuum of exposures" such that "attempting to identify '[the] lowest observed effects level' and adding margins of safety below such levels is not an appropriate approach in this case." PMJA 2134-35. The Administrator accepted that EPA Staff advice when setting the final PM standards. *See* 62 Fed. Reg. at 38,673.

Significantly, the very passage from the PM Staff Report cited by the Administrator in support her "lower bound" point, *see* EPA Br. 31 (citing PMJA 2145, 2147), goes on to explain that the level now relied upon by the Administrator as her "lower bound" reflects "inherent limitations of the data for discerning effects thresholds," and it is "not likely to be risk-free." PMJA 2145-46, 2148. The Administrator herself repeated this advice in the final PM rules, when she acknowledged that her standards could not be "risk-free," given "the inherent uncertainties." 62 Fed. Reg. at 38,665, 38,674. She made the same point before the Court of Appeals, conceding that the PM standards, like the ozone standards, "could not be risk-free" and "cannot eliminate all risk to public health." Resp. Br. in D.C. Cir. No. 97-1440, at 34, 119.

The conceded existence of PM health risks below the levels selected by the Administrator is entirely consistent with the reference to the "long-term epidemiological data" mentioned in her "lower bound" statement. *See* EPA Br. 31. To begin, it bears noting that the Administrator only defends the annual $PM_{2.5}$ NAAQS and barely even acknowledges the existence of the 24-hour $PM_{2.5}$ and PM_{10} standards. *See id.* at 10-11 & n.11, 31-33. With respect to the annual $PM_{2.5}$ NAAQS, she claims to have relied on "a scientific criterion applicable to epidemiological studies—statistical significance to the 95% confidence level." *Id.* at 32. But the Administrator never so limited herself below; quite the contrary, she claimed that "[t]here is *no requirement* that EPA have some theoretical ideal amount of scientific information *or degree of certainty* before establishing or revising a NAAQS." Resp. Br. in D.C. Cir. No. 97-1440, at 49 (emphasis added). Nor did the Administrator so limit herself in selecting the 24-hour $PM_{2.5}$ or other PM NAAQS, or more generally, in other Clean Air Act rulemakings. *See e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (*en banc*) ("95% certainties" have "never characterized . . . the administrative process").

Moreover, the Administrator's new focus on the statistical significance of reported studies at the 95% confidence level is, in any event, a scientific *non sequitur* as it relates to the separate scientific question of determining a threshold effects level. Statistical significance is simply a means of testing the null hypothesis, specifically, the likelihood that an association between an identified level of exposure and a specified health effect is explainable by chance. Kenneth F. Rothman, *et al.*, MODERN EPIDEMIOLOGY 184 (1998). It says nothing about the separate question of whether effects—even highly dangerous effects—may occur at levels well below the levels found statistically significant in the study. Indeed, the Administrator herself made essentially that point below: "[e]ven at levels *below* the hypothetical thresholds" considered in the studies, "risk estimates indicated increased mortality and morbidity that were *significant* from a public health perspective." Resp. Br. in D.C. Cir. No. 97-1440, at 77 (emphases added). In short, the Administrator did not (and could not) determine a health effects threshold on the record here—a fact which only confirms the fatal indeterminacy in the Administrator's decisionmaking that, together with *Lead Industries*, led to the Court of Appeals' nondelegation holding.

C. Repudiating *Lead Industries* and Requiring Consideration of Competing Factors in Setting NAAQS Will Supply the Missing Intelligible Principle and Resolve the Nondelegation Problem.

As detailed in our brief as cross-petitioners, the Clean Air Act, properly construed, requires that the Administrator consider competing factors including costs (and the costs to health) in setting NAAQS. The text, fairly and naturally understood, compels that conclusion, *see* Cross-Pet. Br. 33-37, and it is confirmed by the statutory structure and purposes, *see id.* at 37-43. Moreover, any ambiguity that might, in other circumstances, be perceived in the text disappears, given that "Congress could not have intended to delegate" to the

Administrator "a decision of such economic and political significance" as whether to exclude all non-health factors in setting NAAQS. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); *MCI v. AT&T*, 512 U.S. 218, 231 (1994); *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *id.* at 1667 (Breyer, J., dissenting). The textual imperative under these circumstances is further reinforced both by the need for transparency in the agency decisionmaking process, *see* Cross-Pet. Br. 43-47, and by the necessities of effective executive, congressional and judicial oversight of EPA's NAAQS standard-setting, *see id.* at 47-50.

Starting from the ostensibly different perspective of the nondelegation doctrine, the D.C. Circuit reached an analogous conclusion in *Lockout/Tagout I*. Specifically, that court concluded that the missing "intelligible principle" in cases such as this is a "cost-benefit analysis," by which the court meant "only a systematic weighing" of competing considerations, including costs. 938 F.2d at 1321. The court went on to define that "systematic weighing" at its most basic conceptual level by citing what "Benjamin Franklin referred to as a 'moral or prudential algebra'":

> When those difficult cases occur, they are difficult, chiefly because while we have them under consideration, all the reasons pro and con are not present to the mind at the same time. . . . To get over this, my way is to divide half a sheet of paper by a line into two columns; writing over the one Pro, and over the other Con. . . . And, though the weight of reasons cannot be taken with the precision of algebraic quantities, yet when each is thus considered, separately and comparatively, and the whole lies before me, I think I can better judge, and am less liable to make a rash step. . . .

Id. (citation omitted). In line with this conception, our cross-petition demonstrates that the Act requires the Administrator to consider competing factors in NAAQS rulemakings, as is the usual practice in proceedings setting important health and safety standards. *See, e.g., Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) (safety agency "correct to look at the costs as well as the benefits" of auto safety regulations).

The Administrator nonetheless raises an alarm that such a weighing of competing considerations would at once rob her of all discretion in setting NAAQS and spell the death-knell of environmental regulation under the Clean Air Act. But one need look no further than President Clinton's Executive Order 12,866 to see that this is not the case. *See* 58 Fed. Reg. 51,735 (Sept. 30, 1993). Apart from the requirement that agencies "should assess all costs and benefits of available regulatory alternatives," *see id.* § 1(a), the Executive Order (like Ben Franklin's "systematic weighing of pros and cons") would leave the agency with considerable discretion over nearly every aspect of NAAQS standard-setting. For example, the agency would retain discretion within APA constraints to assess both "the degree and nature of the risks," to decide which costs and benefits are capable of being quantified and which are not, and to decide how to factor in matters such as "distributional impacts" and "equity." *Id.* § 1(a, d). Nor would such "a systematic weighing" prevent EPA from regulating ozone, PM or other substances under the Act (although it might call into question regulations which, without explanation, impose costs that exceed the benefits, *see* Cross-Pet. Br. 10-12, 18-19, 30, 46).

This Court has sometimes deployed the nondelegation doctrine as a means of "giving *narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene* and *NCTA*) (emphasis added); *accord Amalgamated*

Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal J.). But whatever the merits of aggressive judicial construction in other cases, there is no need for such carpentry here. As our brief as cross-petitioners demonstrates, the plain meaning of the Act, together with a great variety of supporting considerations—including the nondelegation doctrine as detailed in this brief—all compel the conclusion that the Administrator must weigh all competing *public health* factors, including costs (and costs to health), in setting NAAQS.

The Administrator pins much of her argument on the claim that "the Court of Appeals improperly employed the nondelegation doctrine to expand the scope of its review." EPA Br. 26-31. That claim also is misplaced. Perhaps, given *Lead Industries* and the conceded "indeterminancy" of the Administrator's NAAQS decisionmaking, the lower court might simply have declared section 109(b)(1) unconstitutional under this Court's nondelegation decisions. But the Court of Appeals' remand remedy was both well-grounded in circuit precedent, *see* ATA Cross-Pet. for *Cert.* 10-12 (citing cases), and readily defensible under *Chevron II*. *See* Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399 (2000).

In any event, the lower court can hardly be faulted for giving the Administrator a final chance to fashion an interpretation that might pass constitutional muster. The Administrator certainly retains significant discretionary authority over NAAQS standard-setting—except, of course where her assertions of authority collide with Congress' unambiguous intent or requirements of the nondelegation doctrine. Under such circumstances, and given *Chevron*, it was hardly error for the Court of Appeals to remand before finally deciding whether or not the *Lead Industries* doctrine itself rendered the Act unconstitutional. Indeed, if this Court

ultimately decides to repudiate *Lead Industries*, it should follow the Court of Appeals' lead and order a remand to the agency for promulgation of new standards, albeit after vacating both the ozone and PM standards challenged in this case.

II. THE COURT OF APPEALS' IMPLEMENTATION HOLDING IS CORRECT, BUT NEED NOT BE REACHED BY THIS COURT.

Like the issues presented in our cross-petition, and the nondelegation issue discussed above, the Administrator's Subpart 2 claims may be readily resolved through proper statutory construction. Specifically, the Court of Appeals' holding that the Administrator may not implement a revised ozone standard lower that the standard in effect on the date of the 1990 Clean Air Act Amendments is compelled by the plain language, structure and drafting history of the Act—all of which carry out Congress' specific intent to deprive the Administrator of the very discretion she now seeks to recover. *See* Part II.A, *infra*. Moreover, contrary to the Administrator's claim, that issue was ripe for decision by the Court of Appeals. Nonetheless, this Court may properly elect not to address Subpart 2 for quite different reasons; namely, that the Administrator's Subpart 2 arguments go only to the rationale of the decision below, not its ultimate result. *See* Part II.B, *infra*.

A. The Court of Appeals Correctly Held that Subpart 2 Applies to Implementation of All Ozone NAAQS, Including Revised Ozone NAAQS, Thus Effectively Precluding Implementation of the Ozone NAAQS Under Review Here.

On the merits, the question presented is whether the 1990 Congress' painstakingly crafted solution to the long-standing ozone nonattainment problem was intended to be binding—or, as the Administrator argues, "stillborn" from the moment of enactment. Pet App. 42a. In particular, the Administrator

seeks repeal of the "specific[]" directives of Subpart 2 of Part D of the Act's Title I, so that she can pursue a different policy under her "*general* authority under other provisions of the CAA." EPA Br. (I) (emphasis added). But that claim is implausible on its face, for it is a "commonplace of statutory construction" that "the specific governs the general," not the other way around. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Indeed, this canon has particular applicability here, because Congress enacted Subpart 2 precisely in order to strip the Administrator of discretion she previously had, and is now attempting to reassert, under the Act's Subpart 1. It is therefore not surprising that the Administrator's interpretation is precluded by plain statutory text, *see* Part II.A.1, *infra*, as well as by the Act's structure, drafting history and purposes, *see* Part III.A.2, *infra*, and is by no means required to avoid "absurd results," *see* Part III.A.3, *infra*.

1. The Text of Subpart 2 Unambiguously Encompasses Implementation of All Ozone NAAQS.

The statutory text alone is dispositive because in this instance "Congress has spoken on the 'precise question at issue.'" Pet. App. 38a (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984)). Specifically, the Act requires that the Nation be divided into air quality areas, and that each area be designated "attainment," "nonattainment" or "unclassifiable" with respect to each NAAQS. *See* CAA § 107(b-d), 42 U.S.C. § 7407(b-d). Areas designated "nonattainment" are then assigned "classifications" and mandated "attainment dates" (deadlines for achieving "attainment" status) under one of several subparts of the Act. As the Administrator notes, Subpart 1 *generally* governs the assignment of classifications and attainment dates "with respect to any national ambient air quality standard," including "any revised standard." CAA § 172(a)(1)(A), 42 U.S.C.

§ 7502(a)(1)(A); EPA Br. 45. Under this subpart, the Administrator assigns classifications based on discretionary factors such as "severity of nonattainment" and "feasibility" of "pollution control measures," and then, based in part on these classifications, assigns each area an attainment date. CAA § 172(a)(1)(A), (2)(A), 42 U.S.C. § 7502(a)(1)(A), (2)(A).

Of central importance here, however, Subpart 1 expressly states that this discretionary regime "*shall not apply* with respect to nonattainment areas for which classifications are *specifically provided under other provisions of this part.*" CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C) (emphasis added); *see also* CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D) (same for attainment dates). Moreover, this express exception squarely applies to the ozone NAAQS. That is because Congress "specifically provide[d]" classifications and attainment dates for implementation of the ozone standard in the Act's Subpart 2. *See* Pet. App. 43a. In particular, Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then sets out classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.* Attainment dates vary by classification, and extend until 2010 for those areas that have the most severe nonattainment problems. *See id.* Table 1 is reprinted below:

Area Class	Design Value	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after [enactment]
Moderate	0.138 up to 0.160	6 years after [enactment]
Serious	0.160 up to 0.180	9 years after [enactment]
Severe	0.180 up to 0.280	15 years after [enactment]
Extreme	0.280 and above	20 years after [enactment]

As noted above, section 181(a)(1), including Table 1, applies by its terms to "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)]." Since section 107(d) expressly governs designations pursuant to "new *or revised* standards," the plain language of sections 172, 181, and 107 together unambiguously provide that Table 1 governs the assignment of classifications and attainment dates for *all* ozone NAAQS, including the revised ozone NAAQS established by the Administrator in this case. *See* CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A) (emphasis added); *see also* CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) ("Upon promulgation *or revision* of a [NAAQS], the Administrator shall promulgate the designations of all areas") (emphasis added).

Table 1 conspicuously establishes classifications *only* for areas with ozone levels above 0.12 parts per million ("ppm")—the level of the 1979 ozone NAAQS. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). It thus makes no provision for ozone standards set below the 0.12 ppm level. By requiring that all ozone nonattainment areas be assigned classifications and attainment dates only pursuant to Table 1, and then establishing a 0.12 ppm lower-bound for the assignment of those classifications and attainment dates,

sections 172, 181, and 107 preclude the Administrator from making nonattainment designations or assigning classifications or attainment deadlines for any ozone NAAQS lower than the one established in 1979. In sum, the Act unambiguously precludes implementation in any fashion of a more stringent ozone NAAQS.

The Administrator has never found a valid response to this straightforward textual analysis. In the Court of Appeals, she initially argued that Congress erred in cross-referencing section 107(d) in its entirety, and instead must have intended to reference only subsection 107(d)(4), which provided for initial designations immediately after the 1990 Amendments. *See* Pet. App. 42a. On rehearing, she switched to arguing in favor of a different scrivener's error, claiming that Congress actually meant to cross-reference "section 107(d)(1)(C) and section 107(d)(4)." Pet. App. 79a. Now before this Court she appears to have reverted to her original interpretation, albeit without expressly renouncing the position she argued on rehearing.

As the Court of Appeals explained, however, there is no basis for deeming these critical statutory provisions the "drafting error" that the Administrator's interpretation "implies." Pet. App. 39a. To the contrary, Congress chose to reference section 107(d) *as a whole*, not only in Subpart 2, but also in Subparts 3, 4, and 5 of the Act, which provide guidelines for implementation of the other five NAAQS then on the books (carbon monoxide, PM, sulfur oxides, nitrogen dioxide, and lead). *See* CAA §§ 186(a)(1), 188(a)(1), 191(a)(1), 42 U.S.C. §§ 7512(a)(1), 7513(a)(1), 7514(a)(1). The Court of Appeals explained that all "Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. Pet. App. 79a. The Administrator's "interpretation" thus implausibly posits not an isolated scriveners's error, but a total scrivening breakdown.

The Administrator further attempts to evade the Act by arguing that, however clear *Subpart 2* and analogous provisions

might be, *Subpart 1* conflicts with itself, thus creating ambiguity. *See* EPA Br. 45-46. She seeks to manufacture this ambiguity by observing first that the classification provisions of Subpart 1 state that they govern the classification of areas pursuant to any NAAQS, including "'any revised standard.'" She then notes that these same provisions state that they "'shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part'"—namely, areas for which classifications are "specifically provide[d]" under Subparts 2, 3, and 4. Finally, the Administrator deems these statements "seemingly competing references" and proceeds to read Subpart 2 out of the Act. *See id.* (quoting CAA § 172(a)(1)(A, C), 42 U.S.C. § 7502(a)(1)(A, C)).

But, there is nothing at all unusual about this statutory structure—provisions that first speak in broad terms and then carve out exceptions. In this case, Subpart 1's default classification provisions continue to govern any revised sulfur oxide, nitrogen dioxide, or lead NAAQS (covered in Subpart 5), plus any new NAAQS for other substances, because Congress has not "specifically provide[d]" classifications for these NAAQS elsewhere in part D. CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C). In contrast, however, Congress *did* "specifically provide" classifications for ozone, as well as for PM and carbon monoxide. Subpart 1 thus fully accords with both itself and with Subparts 2, 3, and 4 (governing ozone, carbon monoxide, and PM, respectively) by stating in section 172(a)(1)(C) that it "'shall not apply with respect to" these three types of "nonattainment areas," for which Congress has elsewhere "specifically provided" classifications. *Id.*

Lacking arguments based on statutory text, the Administrator is left to rely only on the *title* of a single subsection (subsection 181(a)), which she says "clarifies that Section's reach and resolves any confusion." EPA Br. 46. But this Court has held that a title "is of use only when it sheds

light on some ambiguous word or phrase," *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (brackets omitted); it "cannot be allowed to create an ambiguity in the first place." Pet. App. 43a (citations and quotations omitted). As demonstrated above, there is no textual confusion in this case; hence no occasion for "clarification." Moreover, even if there were ambiguity, it would be resolved first and foremost, not by resort to titles, but by application of the "commonplace of statutory construction" that "the specific," highly detailed provisions of Subpart 2 should "govern" the much more "general" provisions of Subpart 1. *Morales*, 504 U.S. at 384.

In fact, however, subsection 181(a)'s title not only is irrelevant, it also does not support the Administrator. That title reads, "Classification and attainment dates for 1989 nonattainment areas." According to the Administrator, these "1989 nonattainment areas are, of course, the areas that were subject to the one-hour ozone standard then in force." EPA Br. 46. But that interpretation cannot be correct. Initial designations and classifications under the 1990 Amendments were to occur, not in 1989, but in late 1990 or 1991. *See* CAA § 107(d)(4)(A)(i), 42 U.S.C. § 7407(d)(4)(A)(i). The Administrator never explains why Congress would have consciously decided *not* to apply its elaborate Subpart 2 implementation regime to nonattainment areas that had lapsed into nonattainment in 1990, or, conversely, why it *would* apply its scheme to areas that had achieved attainment after 1989 but before enactment of the Amendments. *See, e.g.*, 55 Fed. Reg. 35,625 (Aug. 31, 1990). In fact, EPA's actual initial designations under the 1990 Amendments occurred in 1991 and were based on areas' attainment status as of the date of enactment of the Act, November 15, 1990—these designations had nothing to do with areas' 1989 status. *See* 56 Fed. Reg. 56,694 (Nov. 6, 1991). In addition, the Administrator also fails to explain her logical leap from a reference to 1989 *areas* to her conclusion that Subpart 2 governs implementation of the 1989 *standards*. And finally, she simply overlooks the absence of an

analogous date in the title of section 186(a), which provides classifications, attainment dates, and control methods for the carbon monoxide NAAQS. *See* CAA § 186(a), 42 U.S.C. § 7512(a) (entitled "Classification by operation of law and attainment dates for nonattainment areas").

Any possible confusion created by the subsection 181(a) title is easily resolved by the 1990 drafting history. Specifically, the title to subsection 186(a) which governs carbon monoxide was changed in the drafting process from an earlier version that was precisely parallel to the enacted version of the subsection 181(a) title. *See* H.R. 3030, 101st Cong. § 104 (1989), *reprinted in* II Senate Comm. on Env. and Public Works, 103d Cong., *Legislative History of the Clean Air Act Amendments of 1990*, at 3832 (1993) ("*1990 Legislative History*"). Subsection 181(a)'s title apparently should have simultaneously received conforming changes, but, for whatever reason, those changes were never made. This minor oversight is of much less importance, however, than the fact that the Administrator is compelled to rest her entire "textual" case—not on the statutory text itself—but instead on a loosely drafted, easily explained, subsection *title* that is not properly part of the statute.

2. The Statutory Structure and Legislative History Confirm that Subpart 2 Governs Implementation of All Ozone NAAQS.

The structure, drafting history and statutory evolution of Subpart 2 confirm that its provisions mean what they say and were affirmatively intended to withdraw the very implementation authority the Administrator now seeks to recover. *Cf. Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35, 42-43 (1990) (no deference due when in light of "the provisions of the whole law, and . . . its object and policy," the statute "clearly expresses Congress' intention") (internal quotation omitted). As explained below, Congress enacted Subpart 2 to "strip[] the EPA of discretion" because the Agency

had failed to bring the Nation into compliance with the ozone NAAQS, and in particular, had permitted States to miss deadlines, had extended those deadlines, and then had watched the States miss them again. *See* Pet. App. 39a-40a; H.R. Rep. No. 101-490, pt. 1, at 145-48 (1990), *reprinted in II 1990 Legislative History*, at 3169-72; S. Rep. No. 101-228, at 10-12 (1989), *reprinted in V 1990 Legislative History*, at 8350-52 ("1989 Senate Report").

With Subpart 2, Congress sought to remedy these problems with EPA's implementation discretion by setting what it viewed as "realistic," long-term schedules and controls that take effect "by operation of law" and replace the former, much more discretionary implementation regime. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1); 1989 Senate Report at 12, *reprinted in V 1990 Legislative History*, at 8352. Congress' cure for the pre-1990 Act's perceived flaw—its failure to furnish sufficiently concrete guidance for selecting and enforcing ozone control measures—is therefore evident not just in sections 107, 172, and 181(a), but throughout the structure, drafting history and statutory evolution of Subpart 2.

For instance, carefully crafted Subpart 2 provisions reinforce the statutory lower-bound on ozone NAAQS implementation by withdrawing the Administrator's discretion to adjust the ozone NAAQS compliance calculation. The Administrator is thus directed to calculate design values for classification purposes "according to the interpretation methodology issued by the Administrator most recently *before* November 15, 1990," and to "submit[] *to Congress*"— but not herself to act upon—a report considering whether this frozen methodology is reasonable. *See* CAA §§ 181(a)(1), 183(g), 42 U.S.C. § 7511(a)(1), 7511b(g) (emphasis added). Tellingly, in the one instance in which Congress did permit changes to this methodology, Congress also provided specific safeguards to ensure that the Administrator would not thereby effect a substantive change in the standard. *See* CAA § 181(b)(4)(D),

42 U.S.C. § 7511(b)(4)(D) (addressing certain severe areas). And similarly, while Subpart 2 does provide certain exceptions to the Table 1 compliance schedule, it frames those exceptions in objectively determinate terms and conspicuously fails to create such an exception for ozone NAAQS revisions. *See* CAA §§ 181(a)(4,5), (b)(1), 42 U.S.C. §§ 7511(a)(4,5), (b)(1).

Viewed in broader terms, it is even more evident that Subpart 2 cannot be subject to repeal at the Administrator's whim or command. Subpart 2 sets out page upon page of detailed provisions requiring ozone nonattainment areas to adopt specific control programs. *See, e.g.*, CAA § 182, 42 U.S.C. § 7511a. These controls are integrally related to section 181(a)'s Table 1 and the remainder of the Subpart 2 scheme, as they vary in stringency according to an area's nonattainment classification under that pivotal table. *See* CAA § 182(a-e), 42 U.S.C. § 7511a(a-e). Subpart 2 thus specifies detailed sanctions against States that fail to comply with Table 1's deadlines. *See* CAA § 185, 42 U.S.C. § 7511d. And many Subpart 2 controls provide expressly that they are to be phased in over a period of many years, underscoring that Congress intended Subpart 2 to last. *See, e.g.*, CAA § 182(c)(5), 42 U.S.C. § 7511a(c)(5) (mandating transportation assessments beginning in 1996 "and each third year thereafter" for serious, severe, and extreme areas); CAA § 182(e)(3), 42 U.S.C. § 7511a(e)(3) (imposing clean fuels and advanced technology requirements for severe areas beginning in 1998). Moreover, Subpart 2 makes automatic provision for additional control measures in areas that miss attainment dates. These provisions, also integrally related to the Table 1 classifications, require even greater emissions reductions indefinitely into the future, even after initial attainment deadlines have been missed. *See* CAA § 181(b)(2, 4), 42 U.S.C. § 7511(b)(2, 4). Accordingly, Subpart 2 can only be seen for what it is—the carefully drawn and lasting blueprint for revoking the Administrator's discretionary implementation authority.

Given the importance of these restrictions on the Administrator's authority, it is not surprising that the 1990 Congress considered—and rejected—several proposals that would have granted her additional authority of the sort she now seeks. For instance, Congress rejected bills that would have limited Subpart 2 to the 1979 ozone NAAQS then in force. The bill passed by the Senate but later modified in conference, as well as a bill introduced but rejected by the House, would have applied Subpart 2 solely to designations made pursuant to what later became section 107(d)(4)—the one-time provision governing designation immediately after the 1990 Amendments. *See* S. 1630, 101st Cong. §§ 101, 107 (1990) ("1990 Senate Bill"), *reprinted in III 1990 Legislative History*, at 4124-25, 4195; H.R. 3030, 101st Cong. §§ 101(a), 103 (1989), *reprinted in II 1990 Legislative History*, 3748-49, 3795-96. Similarly, Congress also considered and rejected a classification plan that would have accommodated a revised and tightened ozone standard. The Senate bill thus included a table, reprinted below, which would have set classifications and attainment dates based on the *percentage* by which an area exceeded such a flexible NAAQS:

Area Classification	**Amount by which standard exceeded**
Moderate ozone nonattainment area	Not greater than 20 per centum
Serious ozone nonattainment area	More than 20 per centum but less than 50 per centum
Severe ozone nonattainment area	Equal to or greater than 50 per centum but not more than 120 per centum
Extreme ozone nonattainment area	More than 120 per centum

S. 1630, 101st Cong. § 107 (1990), *reprinted in III 1990 Legislative History*, at 4195. Because "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation omitted), Congress' rejection of these legislative alternatives underscores that Subpart 2 means exactly what it says.

Finally, this definitive evidence from text, structure and drafting history is further confirmed by the context within which Congress enacted the 1990 Amendments. The fatal flaws that emerged from both the 1970 and 1977 Amendments to the Act were their failure to set out specific controls and realistic attainment deadlines for ozone. EPA promulgated its first ozone NAAQS in early 1971, together with other NAAQS for particulate matter, sulfur dioxide, nitrous oxides, carbon monoxide and hydrocarbons. *See* 36 Fed. Reg. 8,186 (Apr. 30, 1971). The Act at that time contemplated enforcement of all of these standards through one-size-fits-all implementation that essentially called for attainment of all primary NAAQS, by all areas of the Nation, by 1975. *See* CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A) (1976). This statutory structure broke down, however, when large areas of the Nation simply failed to comply—especially with the 1971 ozone NAAQS—by that date. Widespread nonattainment led, unsurprisingly, to litigation designed to enforce the Act's literal requirements. These cases included a ruling that the Clean Air Act required massive social and economic dislocation in California in order to achieve ozone compliance, *see City of Santa Rosa v. EPA*, 534 F.2d 150, 153 (9th Cir.), *vacated sub nom. Pacific Legal Found. v. EPA*, 429 U.S. 990 (1976), plus other cases posing the question whether the Act had delegated EPA authority to force States to implement EPA-mandated controls to address ozone nonattainment, *see EPA v. Brown*, 431 U.S. 99, 100-02 (1977) (discussing cases). This first Clean

Air Act crisis passed only when the Solicitor General declined to defend EPA's interpretation of the Act, *see id.* at 103-04, and Congress enacted 1977 Amendments which extended the compliance deadlines for ozone and other pollutants, *see* Pub. L. 95-95, 91 Stat. 691 (Aug. 7, 1977).

The 1977 Amendments ultimately failed, however, for the same reasons that the 1970 Amendments failed. To be sure, they introduced a limited degree of differentiation into the schedules for complying with NAAQS. For ozone and carbon monoxide, the pollutants that had largely prompted the Amendments, this regime established a presumptive five-year deadline, with liberal opportunities for further five-year extensions in areas with the most severe nonattainment problems. *See* CAA § 172(a)(1, 2), 42 U.S.C. § 7502(a)(1, 2) (1982). But Congress still did not extensively dictate controls that States (or, failing that, EPA) would have to implement to achieve attainment. Accordingly, notwithstanding the time extensions (and promulgation of a less-stringent ozone NAAQS in 1979), the 1987 ozone attainment deadlines came and went, just as the 1975 deadlines had, with large areas of the Nation remaining in nonattainment. *See* National Research Council, RETHINKING THE OZONE PROBLEM IN URBAN & REGIONAL AIR POLLUTION 4 (1991). High stakes litigation once again ensued. *See, e.g., Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 221-23 (9th Cir. 1992) (describing the history of litigation in California).

After false starts in the 1987, 1988 and 1989 legislative sessions, Congress again passed comprehensive Clean Air Act Amendments in November 1990 addressing, yet again, the recurring ozone nonattainment problem. This time, Congress consciously departed from the one-size-fits-all strategy that twice before had failed. Congress instead set what it viewed as "realistic," long-term schedules and controls that take effect "by operation of law," rather than pursuant to the Administrator's discretion. *See* CAA § 181(a)(1), 42 U.S.C.

§ 7511(a)(1); 1989 Senate Report at 12, *reprinted in V 1990 Legislative History*, at 8352. Although Congress did nominally retain the 1977 regime of a five-year/ten-year attainment schedule with largely discretionary controls, it ghettoized those provisions, now denominated as Subpart 1, by severely restricting their scope of application. *See* pp. 26-27, 30, *supra*. At the same time, Congress also enacted detailed compliance plans targeted at specific pollutants (above all, ozone) as the centerpiece of the 1990 Amendments. These plans are codified in Part D's Subparts 2, 3, 4 and 5. CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f.

If ever "a page of history" could answer "a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.), then surely this history fully answers the Administrator's ever-changing rationalizations for why she should be given back her revoked ozone implementation authority. The Administrator's Subpart 1-based interpretation is nothing less than a bid to turn back the clock and resume implementation of the ozone NAAQS as before 1990, amid the uncertainty, unrealistic deadlines and endless litigation that Congress thought it had eliminated. Read carefully in light of its evolution, it is plain that the Act simply does not permit the Administrator to use Subpart 1 as a sword for bringing about the demise of Subpart 2.

3. Congress' Carefully Crafted Statutory Regime Does Not "Lead to Unworkable and Absurd Results."

Instead of admitting that her interpretation is contrary to the mass of evidence cited above, the Administrator claims that this obvious interpretation would "lead to unworkable and absurd results." EPA Br. 47. In particular, she notes that it "would be impossible" to "classify areas and set their attainment dates for the revised NAAQS's eight-hour standard" under Subpart 2 since Table 1 uses "an air quality measurement based upon one-hour averaging." *Id.* She also states, in this

same vein, that because Table 1 "calculates attainment dates for areas based upon a fixed number of years from 1990," it "makes no sense in calculating attainment dates for a revised NAAQS" promulgated at a later date. *Id.* But these arguments all beg the question, for they depend upon the implicit and unsupportable premise that, notwithstanding its plain text, structure, drafting purposes and evolution, Subpart 2 nonetheless permits EPA to implement its revised ozone NAAQS. For all of the reasons set forth above, that premise is false.

Although some parties have suggested that this interpretation conflicts with the Court of Appeals' holding that the Administrator may *revise* the ozone NAAQS, *see, e.g.*, Mass. Br. 45-46, there is no conflict. Rather, the Administrator remains free to *promulgate* a lower (or higher) revised ozone NAAQS pursuant to her general revision authority under section 109. *See* Pet. App. 24a-36a. What she cannot do is *designate* areas as being in nonattainment with a *lower* revised NAAQS, since areas with ozone levels of 0.12 ppm or below could not be assigned classifications under Table 1. Instead, she must either designate such areas "unclassifiable," *see* CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7404(d)(1)(A)(iii), or (if she chooses) refrain from making a downward revision on the ground that such revision is not "appropriate" under these circumstances. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). If these options were not available, however, Subpart 2 would preclude the Administrator from promulgating a lower revised ozone NAAQS, as explained in the brief filed today by Ohio, Michigan, and West Virginia.

Although the statute precludes enforcement of an ozone NAAQS lower than the ozone NAAQS that was the subject of the 1990 Amendments, downward revisions nonetheless might be meaningful in at least three respects. *First*, and most obviously, Congress could authorize the enforcement of a revised ozone NAAQS if it believed that the Administrator had

shown that the need for implementation outweighed the need for the long-term approach of Subpart 2. Given its experience with EPA's implementation efforts under prior versions of Subpart 1, Congress presumably would accompany any such authorization with a new round of detailed Subpart 2-style implementation instructions. *Second*, even in the absence of congressional action, States could voluntarily comply with the new standard. *See* CAA § 116, 42 U.S.C. § 7416; *cf.* CAA § 181(c)(3), 42 U.S.C. § 7511(c)(3) (authorizing States to bind themselves voluntarily to higher classifications than required by Table 1). Such State action would be especially enabled by designation of local air-quality control regions as "unclassifiable," because then States (and their citizens) would know precisely which local areas did not comply with the stricter standard. *Third*, at the same time that it enacted Subpart 2, Congress also strengthened the Administrator's emergency powers to be used in the event that action were ever truly needed to prevent "an imminent and substantial endangerment to public health" (a stringent standard that is certainly not met on the record here, *see* Cross-Pet. Br. 6-7). *See* Pub. L. 101-549, 104 Stat. 2339, § 711(b) (Nov. 15, 1990) (amending CAA § 303, 42 U.S.C. § 7603). Congress has thus promoted attainment of the existing standard through a balanced approach that leaves some play in the statutory joints.

Given the Court of Appeals' plain-language holdings that the Administrator may *promulgate* lower revised ozone NAAQS, on the one hand, and must assign *classifications and attainment dates* only pursuant to Subpart 2, on the other, the only necessary qualification to the opinion below involves the Administrator's authority to give *nonattainment designations* to areas based on ozone NAAQS revisions that lead to a lower (more stringent) standard. Although the Court of Appeals concluded in a paragraph that she may do so, *see* Pet. App. 36a-37a, its cursory discussion of this intermediate issue was necessarily handicapped by briefing that was essentially nonexistent, due to the Administrator's insistence on reading

Subpart 2 out of the statute entirely. As noted above, the Act unambiguously states that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)] *shall* be classified at the time of such designation, under table 1," which provides classifications only for areas with design values above 0.12 ppm. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Because section 181(a)(1) thereby precludes EPA from designating as nonattainment an area with a design value at or below 0.12 ppm, the Agency cannot designate areas nonattainment with its revised NAAQS.

In opining to the contrary, the Court of Appeals apparently overlooked this point, as well as the possibility that areas could be designated unclassifiable. *See* Pet. App. 36a-37a. The lower court also appears to have read the qualifier "appropriate" out of section 109(b) by requiring the Administrator to revise the NAAQS whenever the health evidence warrants a revision, irrespective of whether the revised standard could be implemented. *See id.* Finally, the Court of Appeals may not have appreciated the automatic consequences that application of a "nonattainment" label triggers—consequences inconsistent with Congress' intention that ozone implementation against the States be conducted only under the Subpart 2 implementation regime. *See, e.g.*, CAA §§ 172(c), 173, 42 U.S.C. §§ 7502(c), 7503. Nonetheless, by far the most important point is that the Court of Appeals' interpretation, like ours but unlike the Administrator's, has the essential merit of recognizing Congress' basic intention that Subpart 2 not be declared stillborn.

B. Although the Subpart 2 Issues Are Ripe for Review, The Court Nonetheless May Decline to Decide Them.

The Court of Appeals correctly held that Subpart 2 revokes the Administrator's authority to implement lower revised ozone NAAQS, but this Court may nonetheless elect not to reach and

affirm that ruling. Specifically, because the Court has long insisted that it sits to review judgments, not statements in opinions, it may well decline to reach the Subpart 2 issues on grounds that they are not properly presented as this case is presently postured.

Ironically, the Administrator herself argues that this Court should not reach the Subpart 2 issue—albeit on the theory that those issues were not properly before the Court of Appeals. The Administrator contends, above all, that the Subpart 2 issues are not reviewable because she rendered a reviewable decision only on her authority to *promulgate* a revised ozone NAAQS, not on her authority to *implement* such a NAAQS. That argument is factually wrong—the Administrator did, quite consciously, render a reviewable decision on implementation issues. But even if she had not, the Administrator would still be wrong on the law. Specifically, although review of implementation issues in their own right was possible and appropriate, the Court of Appeals' Subpart 2 reasoning was also part of its explanation for its promulgation-authority decision *in favor* of the Administrator. The Administrator is hardly in a position to complain now that this favorable result was reached for the wrong reasons.

The Administrator's reviewability arguments are really just attempts to evade the precedential effects of a favorable decision. Indeed, the Administrator never argued that her decision was not final until *after* the Court of Appeals had issued its opinion containing the implementation statements that the Administrator now hopes to erase. *See* Pet. App. 77a. Until that time, the Administrator had argued repeatedly that the interplay between Subparts 1 and 2 *should* be resolved as soon as possible because "adoption of new NAAQS . . . could have profound implications for existing State implementation programs." 61 Fed. Reg. 65,716, 65,745 (Dec. 13, 1996). The Administrator therefore issued, together with her proposals for revising the ozone NAAQS, an Interim Implementation Policy

that concluded that "[t]he detailed provisions of subpart[] 2 . . . would not apply directly to the implementation of a new ozone NAAQS . . . ." 61 Fed. Reg. 65,752, 65,753 (Dec. 13, 1996). She also issued a separate advanced notice of proposed rulemaking on the implementation issues because "waiting until possible standard revisions are actually promulgated would, in the Agency's judgment, cause inevitable delays and disruptions in national, State and local efforts to achieve clean, healthy air, especially those related to attainment of the NAAQS for ozone." 61 Fed. Reg. 65,764 (Dec. 13, 1996). After receiving comments, she rendered her "[f]inal decision" on these issues together with her revised NAAQS. 62 Fed. Reg. at 38,873.

Not surprisingly, the Administrator's post-decision efforts to disown this openly-acknowledged "[f]inal decision," *id.*, rest on an attempted recasting of the record. For the most part, the Administrator claims that her final decision is not truly final because "[t]he sole purpose of [her] discussion [of Subpart 2] was to respond fully to the comments arguing that the 1990 Amendments curtailed EPA's authority to revise the ozone standard." EPA Br. 15; *see also id.* at 19, 34-35. She even goes so far as to emphasize this point by "reproducing the preamble discussion" in the Appendix to her brief. *Id.* at 15. What she fails to mention (at least not until a footnote much later on) is that she *also* addressed implementation issues in a separate portion of her rule "[i]n light of comments received regarding the interpretation proposed in the *Interim Implementation Policy*." 62 Fed. Reg. at 38,873 (emphasis added); *see* EPA Br. 39 n.26. It was there that she issued her "[f]inal decision" by explaining that she had "reconsidered [her] interpretation and now believes that . . . the provisions of Subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard," but that only "the provisions of Subpart 1," *not* Subpart 2, "would apply to the implementation of the new 8-hour O_3 standards." 62 Fed. Reg. at 38,873.

Although the Administrator now pretends that this "preamble discussion" was idle musing, *see, e.g.*, EPA Br. 15, she codified her Subpart 2 ruling in 40 C.F.R. § 50.9(b), *see* 62 Fed. Reg. at 38,894. Moreover, this ruling formed the explicit basis for the "Implementation Plan for Revised Air Quality Standards" issued together with the revised NAAQS. *See* 62 Fed. Reg. 38,421, 38,423, 38,424-27 (July 18, 1997). Indeed, the plan produced by this purportedly idle musing formed the foundation for three different final rules revoking the prior ozone NAAQS in three different sets of areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998).

The Administrator's other footnote contention is that the implementation aspects of her final rule were not challenged before the D.C. Circuit. *See* EPA Br. 39 n.26. In fact, however, numerous parties challenged the entire rule, and the Administrator herself acknowledged the implementation plan's importance by briefing section 50.9(b) and the preamble implementation statements before the Court of Appeals. *See* Resp. Br. in D.C. Cir. No. 97-1441, at 72. Moreover, at the very same time that she sought rehearing below by arguing that implementation issues should not have been decided in this case, the Administrator was arguing before a different D.C. Circuit panel that a separate petition for review challenging her actual implementation of the revised NAAQS was barred *precisely because her Subpart 2 interpretation had been properly challenged in this case*. *See* Resp. Br. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, the Administrator's finality and ripeness arguments amount to an "administrative law shell game," *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), that is being played, not with considered characterizations of actual administrative actions, but with moving targets repositioned from day to day with an eye to expanding or contracting the preclusive scope of the decision below as necessary for the

needs of the moment. The Administrator's "[f]inal decision" is indeed final agency action ripe for review, as further explained in the brief filed today by Ohio, Michigan, and West Virginia.

But even if the Administrator were correct that promulgation was the *only* reviewable issue before the Court of Appeals, the propriety of that court's engaging in its Subpart 2 discussion would still be beyond dispute. There is no question that, despite the finality and ripeness of the Administrator's implementation decisions, the true focus of the implementation debate in the Court of Appeals was squarely on the argument by parties to the ozone rulemaking that Subpart 2 precludes any revision of the ozone NAAQS because, as a matter of law, revisions that may not be implemented are not "appropriate" for promulgation. *See* EPA Br. 34 (agreeing that the promulgation issue was properly before the D.C. Circuit). Confronted with this promulgation argument resting on an implementation premise, the Court of Appeals both (1) brought to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including an analysis of the statute as a whole, and (2) used as a starting point the Administrator's own principal defense—specifically, the extreme claim that Subpart 2 places no limits whatever on implementation of a revised ozone NAAQS.

When the Court of Appeals' decision was handed down, however, the Administrator suddenly announced her disagreement, not with that Court's favorable (for her) resolution of the promulgation issue, but rather with statements in its ensuing discussion. She now seeks review of those statements—statements made over the course of a statutory analysis concededly within the Court of Appeals' jurisdiction. Seen in this light, it is evident that the Administrator's Subpart 2 claims, at bottom, seek only to lessen the *stare decisis* effects of the reasoning the lower court used on its way to a result favorable to the Administrator. This easily explains

her attenuated charges of lack of finality and ripeness, which, if accepted, would provide the basis for seeking to deprive the Subpart 2 decision below of precedential effect, on the grounds that the Subpart 2 issues were not justiciable *when decided*. *Compare, e.g., Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) ("[T]here is no particular reason to assume that a decision, later mooted, is any less valid as precedent than any other opinion of a court.").

None of this is to say that the Subpart 2 statutory issues are not important; they are. The D.C. Circuit's holdings regarding implementation of revised ozone NAAQS addressed matters squarely presented by the parties and necessarily decided by the court (in contrast, for example, to the question regarding designations as "nonattainment"). The Court of Appeals' implementation discussion (unlike its designations discussion) is therefore not *obiter dictum*, but an important part of the rationale for its decision respecting the Administrator's promulgation authority. As such, the implementation discussion (though not its designation discussion) is now entitled to full *stare decisis* or law-of-the-case effect in future proceedings. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (*stare decisis* applies to the result and "those portions of the opinion necessary to th[e] result;" other portions of opinion are *dictum*); *compare, e.g., Montana v. Crow Tribe of Indians*, 523 U.S. 696 n.11 (1998) (law-of-the-case doctrine does not apply to *dictum*); *Hahn v. United States*, 524 U.S. 236, 251 (1998) (*stare decisis* principles relaxed where issue not fully briefed); *Association of Inv. Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982) (same re law-of-the-case doctrine).

But even conceding its importance for future litigation, the irregularity of Subpart 2's procedural posture is undeniable. That irregularity is underscored once one appreciates the extent to which the Administrator's arguments for why these Subpart 2 issues are not final or ripe depend upon the order in which the D.C. Circuit's opinion treats various issues. In

particular, if the D.C. Circuit had instead framed its opinion to reflect the context in which Subpart 2 issues actually arose, it would have noted first that industry and States had raised claims that Subpart 2 (together with related provisions) precludes promulgation of revised standards. It would have then discussed its reasons for rejecting EPA's primary defense to that claim (the argument that Subpart 1, not Subpart 2, governs revised NAAQS). And finally, it would have concluded with its reasons for nonetheless rejecting the promulgation claim on alternative grounds. Had the court below issued *that* opinion—instead of one helpfully and quite innocently reordering the issues into a more comprehensible framework—there could be no claim that the D.C. Circuit reached out to decide anything. There also could be only the most attenuated claims that the Subpart 2 issues are of the sort typically deemed worthy of this Court's attention.

Indeed, merely to state this procedural posture is to call into question the necessity for the Court to address Subpart 2. The Administrator's attempt to induce the Court to erase the precedential effect of the D.C. Circuit's Subpart 2 discussion certainly may cross the "long line of decisions rejecting claims of standing based merely on supposed adverse precedential effect." *Williams Gas Processing-Gulf Coast Co. v. FERC*, 145 F.3d 377 (D.C. Cir. 1998); *see also, e.g., Boston Tow Boat Co. v. United States*, 321 U.S. 632, 632-34 (1944). Moreover, this quarrel over precedent also implicates the rule that the Court does not sit to judge the reasoning, as opposed to results, of lower court decisions. Typically, a lower court's "use of analysis that may have been adverse" to a government agency's "long-term interests" does not permit the agency "to claim status as a losing party for purposes of this Court's review." *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*). It thus has been stressed repeatedly that the Court reviews "judgments, not statements in opinions." *See, e.g., Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of *certiorari*).

Because the Administrator is concerned with the reasoning and not the result of the Subpart 2 holding below, a concluding word respecting the technical disposition of this case is in order. Ordinarily, when the Court inadvertently grants *certiorari* on issues that go only to the rationale of the lower court decision, the proper course is to dismiss *certiorari* "as improvidently granted." That is what occurred in *Rooney* even after full "briefing and oral argument." *Rooney*, 483 U.S. at 311. But here, unlike in *Rooney*, these cases will not go away, given the petition and cross-petition on undoubtedly live issues that are addressed in Part I of this brief. Accordingly, there is no need or occasion here to dismiss questions 2 and 3 of the Administrator's petition. Rather, the Court may elect to issue binding rulings on only the issues detailed in the cross-petition and Part I of this brief, followed by its usual practice of remanding with instructions for further lower court action in light of its decision.

CONCLUSION

For the foregoing reasons, the nondelegation holding should be affirmed, but need not be reached if this Court reverses on the grounds set forth in our brief as cross-petitioners. The challenged Subpart 2 implementation holding is also correct, but this Court need not reach that issue, since the Administrator is seeking review of the rationale used to reach a result in her favor. Accordingly, the Court should consider this case together with the cross-petition, vacate the ozone and particulate matter NAAQS for the reasons spelled out in our brief as cross-petitioners and elaborated on in Part I of this brief, and remand to the D.C. Circuit for further proceedings consistent with its opinion.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc.

CHARLES FRIED
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
Counsel for American Trucking Associations, Inc. and Chamber of Commerce of the United States

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
Counsel for National of Manufacturers

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE
DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

APPENDIX

CAA § 107, 42 U.S.C. § 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall

immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15,

1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality- related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as

the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner,

and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area

or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)—

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM- 10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10. Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate

matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all

States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CAA § 172, 42 U.S.C. § 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final

action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control

technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as

schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

****

(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

CAA § 181, 42 U.S.C. § 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 nonattainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value	Primary standard attainment date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each

ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if—

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) of this section to the higher of—

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B). No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date,

identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

(3) Voluntary reclassification

The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO subx control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 7511a(g) of this title, the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term[s] "major source" and "major stationary source" shall have the same meaning as in Extreme Areas.

(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

(D) If, after November 15, 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

(c) References to terms

(1) Any reference in this subpart to a "Marginal Area", a "Moderate Area", a "Serious Area", a "Severe Area", or an "Extreme Area" shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

(2) Any reference in this subpart to "next higher classification" or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

CAA § 182, 42 U.S.C. § 7511a. Plan submissions and requirements

****

(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms

"major source" and "major stationary source" include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city,

business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the Administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title. Any reference to the term "attainment date" in subsection (b) or (c) of this section, which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) of this section (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan

items) described under this subsection. The provisions of clause (ii) of subsection (c)(2)(B) of this section (relating to reductions of less than 3 percent), the provisions of parag[r]aphs (6), (7) and (8) of subsection (c) of this section (relating to de minim[i]s rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) of this section (relating to reductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms "major source" and "major stationary source" includes (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions

of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen—

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen. For purposes of this subsection, the term "primary fuel" means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 [15 U.S.C.A. § 3361 et seq.]).

(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control

techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that—

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions. Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2) of this section, and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2) of this section.

Any reference to the term "attainment date" in subsection (b), (c), or (d) of this section which is incorporated by reference into this subsection, shall refer to the attainment date for Extreme Areas.

****

CAA § 183, 42 U.S.C. § 7511b. Federal ozone measures

****

(g) Ozone design value study

The Administrator shall conduct a study of whether the methodology in use by the Environmental Protection Agency as of November 15, 1990, for establishing a design value for ozone provides a reasonable indicator of the ozone air quality of ozone nonattainment areas. The Administrator shall obtain input from States, local subdivisions thereof, and others. The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990. The results of the study shall be subject to peer and public review before submitting it to Congress.

****

CAA § 185, 42 U.S.C. § 7511d. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain

(a) General rule

Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c) of this section, pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b) of this section, for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

(b) Computation of fee

(1) Fee amount

The fee shall equal $5,000, adjusted in accordance with paragraph (3), per ton of VOC emitted by the source during the calendar year in excess of 80 percent of the baseline amount, computed under paragraph (2).

(2) Baseline amount

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

(3) Annual adjustment

The fee amount under paragraph (1) shall be adjusted annually, beginning in the year beginning after 1990, in accordance with section 7661a(b)(3)(B)(v) of this section (relating to inflation adjustment).

(c) Exception

Notwithstanding any provision of this section, no source shall be required to pay any fee under subsection (a) of this section with respect to emissions during any year that is treated as an Extension Year under section 7511(a)(5) of this title.

(d) Fee collection by Administrator

If the Administrator has found that the fee provisions of the implementation plan do not meet the requirements of this section, or if the Administrator makes a finding that the State is not administering and enforcing the fee required under this section, the Administrator shall, in addition to any other action authorized under this subchapter, collect, in accordance with procedures promulgated by the Administrator, the unpaid fees required under subsection (a) of this section. If the Administrator makes such a finding under section 7509(a)(4) of this title, the Administrator may collect fees for periods before the determination, plus interest computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes), to the extent the Administrator finds such fees have not been paid to the State. The provisions of clauses (ii) through (iii) of section 7661a(b)(3)(C) of this title (relating to penalties and use of the funds, respectively) shall apply with respect to fees collected under this subsection.

(e) Exemptions for certain small areas

For areas with a total population under 200,000 which fail to attain the standard by the applicable attainment date, no sanction under this section or under any other provision of this chapter shall apply if the area can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone or ozone precursors transported from other areas. The prohibition applies only in cases in which the area has met all requirements and implemented all measures applicable to the area under this chapter.

CAA § 186, 42 U.S.C. § 7512. Classification and attainment dates

(a) Classification by operation of law and attainment dates for nonattainment areas

(1) Each area designated nonattainment for carbon monoxide pursuant to section 7407(d) of this title shall be classified at the time of such designation under table 1, by operation of law, as a Moderate Area or a Serious Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for carbon monoxide shall be as expeditiously as practicable but not later than the date provided in table 1:

TABLE [1]

Area classification	Design value	Primary standard attainment date
Moderate	9.1-16.4 ppm	December 31, 1995
Serious	16.5 and above	December 31, 2000

****

CAA § 188, 42 U.S.C. § 7513. Classifications and attainment dates

(a) Initial classifications

Every area designated nonattainment for PM-10 pursuant to section 7407(d) of this title shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart as a

"Moderate Area") at the time of such designation. At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each PM-10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious

(1) Reclassification before attainment date

The Administrator may reclassify as a Serious PM-10 nonattainment area (identified in this subpart also as a "Serious Area") any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c) of this section) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain

Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date—

(A) the area shall be reclassified by operation of law as a Serious Area; and

(B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

(c) Attainment dates

Except as provided under subsection (d) of this section, the attainment dates for PM-10 nonattainment areas shall be as follows:

(1) Moderate Areas

For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas

For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the date shall not extend beyond December 31, 2001.

****

CAA § 191, 42 U.S.C.§ 7514. Plan submission deadlines

(a) Submission

Any State containing an area designated or redesignated under section 7407(d) of this title as nonattainment with respect to the national primary ambient air quality standards for sulfur oxides, nitrogen dioxide, or lead subsequent to November 15, 1990 shall submit to the Administrator, within 18 months of the designation, an applicable implementation plan meeting the requirements of this part.

(b) States lacking fully approved State implementation plans

Any State containing an area designated nonattainment with respect to national primary ambient air quality standards for sulfur oxides or nitrogen dioxide under section 7407(d)(1)(C)(i) of this title, but lacking a fully approved implementation plan complying with the requirements of this chapter (including this part) as in effect immediately before November 15, 1990, shall submit to the Administrator, within 18 months of November 15, 1990, an implementation plan meeting the requirements of subpart 1 (except as otherwise prescribed by section 7514a of this title).

CAA § 192, 42 U.S.C.§ 7514a. Attainment dates

(a) Plans under section 7514(a)

Implementation plans required under section 7514(a) of this title shall provide for attainment of the relevant primary standard as expeditiously as practicable but no later than 5 years from the date of the nonattainment designation.

(b) Plans under section 7514(b)

Implementation plans required under section 7514(b) of this title shall provide for attainment of the relevant primary national ambient air quality standard within 5 years after November 15, 1990.

(c) Inadequate plans

Implementation plans for nonattainment areas for sulfur oxides or nitrogen dioxide with plans that were approved by the Administrator before November 15, 1990, but, subsequent to such approval, were found by the Administrator to be substantially inadequate, shall provide for attainment of the relevant primary standard within 5 years from the date of such finding.

(23)

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR RESPONDENTS APPALACHIAN POWER COMPANY, *et al.*,

DAVID E. MENOTTI
WILLIAM F. PEDERSEN
JEFFREY A. KNIGHT
SHAWPITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8675
Counsel for American Forest & Paper Association, American Iron & Steel Institute, and Alliance of Automobile Manufacturers

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
JAMES N. CHRISTMAN
LUCINDA MINTON LANGWORTHY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Appalachian Power Co., et al., American Public Power Association, and National Association of Home Builders

September 9, 2000

[Additional Counsel Listed Inside]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

100pp

G. WILLIAM FRICK
M. ELIZABETH COX
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8250
Counsel for American Petroleum Institute

RUSSEL S. FRYE
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
(202) 342-8878
and
RICHARD WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION, INC.
1111 19th Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 463-2582
Counsel for American Forest & Paper Association, Inc.

GRANT CRANDALL
General Counsel
UNITED MINE WORKERS OF AMERICA, AFL-CIO
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7200
and
EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
(304) 258-1977
Counsel for United Mine Workers of America, AFL-CIO

DAVID F. ZOLL
ALEXANDRA DAPOLITO DUNN
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5165
Counsel for American Chemistry Council

JULIE BECKER
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5500
Counsel for Alliance of Automobile Manufacturers

HAROLD P. QUINN, JR.
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652
Counsel for National Mining Association

MARCELLE SHOOP
Associate General Counsel
KENNECOTT UTAH COPPER CORPORATION
8315 West 3595 South
P.O. Box 6001
Magna, Utah 84044-6001
(801) 252-3000
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

DAVID M. FLANNERY
JACKSON & KELLY
P.O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group and West Virginia Chamber of Commerce

KURT E. BLASE
O'CONNOR & HANNAN
Suite 500
1666 K Street, N.W.
Washington, D.C. 20006-2803
(202) 887-1400
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, Kennecott Services Company, and National Stone Association

DUANE J. DESIDERIO
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 861-2146
Counsel for National Association of Home Builders

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Company.

QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for the Agency to develop an intelligible principle for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review final action taken by the EPA Administrator under the Clean Air Act which resolved the question of whether the congressional "Subpart 2" ozone risk management program restricted EPA's authority to adopt and enforce a more stringent ozone NAAQS.

3. Whether the comprehensive and long-term risk management program Congress enacted to ensure reductions of ozone in the ambient air restricted EPA's authority to establish a more stringent ozone NAAQS.

AMENDED DISCLOSURE STATEMENT

1. Pursuant to Supreme Court Rule 29.6 and the Corporate Disclosure Statement filed by Appalachian Power Co., *et al.*, in its Response to the Petition for Writ of Certiorari filed in this case, the following list discloses additional parent companies, and publicly held companies that own 10% or more, of any party joining in this brief.

   Carolina Power & Light Co.
   (10% or greater owner: State Street Bank & Trust Co. Boston)
   Illinois Power
   (a subsidiary of Dynergy, Inc.)
   Kennecott Energy and Coal Co.
   (an indirect subsidiary of Rio Tinto PLC)
   Kennecott Holdings Corporation
   (an indirect subsidiary of Rio Tinto PLC)
   Kennecott Services Company
   (an indirect subsidiary of Rio Tinto PLC)
   Otter Tail Power Co.
   (10% or greater owner: Otter Tail Power Co. ESOP)

2. The following parties joining this brief have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these parties.

   American Chemistry Council (formerly Chemical Manufacturers Association)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

AMENDED DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

GLOSSARY xv

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. THE STATUTORY SCHEME 2

A. The NAAQS Program 2

B. Application and Enforcement of NAAQS 3

II. THE 1997 OZONE AND PM NAAQS REVISIONS 6

A. The Administrative Record on Ozone 7

B. The Administrative Record on PM 10

C. The Impacts of Standard Revision 15

D. The Administrator's Decisions 16

III. THE D.C. CIRCUIT DECISIONS 19

SUMMARY OF ARGUMENT 20

ARGUMENT 22

I. EPA IMPROPERLY CONSTRUED THE STATUTE TO PROVIDE NO LEGAL STANDARD, OR "INTELLIGIBLE PRINCIPLE," THAT WOULD GUIDE ITS EXERCISE OF PUBLIC HEALTH RISK MANAGEMENT JUDGMENT. 22

A. EPA Improperly Claims Unfettered Authority to Exercise Public Health Risk Management Judgment. 24

B. EPA Is Obligated To Identify the Principle that Guides Its Exercise of Rulemaking Authority Even Where Congress Acts By Broad Delegation. 31

C. There Is Law To Apply To Guide EPA's Exercise of Risk Management Judgment. 33

II. EPA'S REVISION TO THE OZONE NAAQS, TOGETHER WITH ITS REVOCATION OF THE EXISTING STANDARD, IS REVIEWABLE FINAL AGENCY ACTION 35

A. EPA's Determination of Its Authority To Revise the Ozone NAAQS Is Final Action. 36

B. EPA's Decision To Replace Subpart 2 Is Ripe. .. 40

III. SUBPART 2 RESTRICTS EPA'S AUTHORITY TO REVISE THE OZONE NAAQS 42

A. Subpart 2's Plain Language Precludes EPA From Replacing the Existing Ozone NAAQS. 42

B. Subpart 2's History and Structure Confirm It Is the Exclusive Plan for Managing Ozone. 47

C. Subpart 2 Renders the Revised Ozone NAAQS Unlawful. 49

CONCLUSION 50

APPENDICES 1a

TABLE OF AUTHORITIES

CASES Page

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 25
AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 25, 35
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 41
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944) 24
American Lung Association v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 23, 30
American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 33
American Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir.)., *modified*, 195 F.3d 4 (D.C. Cir. 1999) ..... *passim*
Barrick Goldstrike Mines, Inc. v. Browner, 215 F.3d 45 (D.C. Cir. 2000) 39
Bennett v. Spear, 520 U.S. 154 (1997) 38
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 23, 26
Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 34, 35, 44
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 28
Clinton v. New York, 524 U.S. 417 (1998) 30
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 40

FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291 (2000) 30, 49
FPC v. Conway, 426 U.S. 271 (1976) 33
Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 25
Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141 (1982) 38
HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000) 38
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) 21, 38, 39, 40, 41
Hutchinson v. Proxmire, 443 U.S. 111 (1979) 30
INS v. Chadha, 462 U.S. 919 (1983) 29
Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 25, 26, 29, 30
International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) 24
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 25
Kent v. Dulles, 357 U.S. 116 (1958) 25
Loving v. United States, 517 U.S. 748 (1996) 25, 30
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 41
Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 46
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 31, 33
Mistretta v. United States, 488 U.S. 361 (1989) 25,34
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 23, 30

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 33
National Cable Television Association v. United States, 415 U.S. 336 (1974) 25
New York Central Securities Corp. v. United States, 287 U.S. 12 (1932) 33
Ohio Forestry Association v. Sierra Club, 523 U.S. 726 (1998) 41
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 25
Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 46
Raines v. Byrd, 521 U.S. 811 (1997) 22
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 28
Russello v. United States, 464 U.S. 16 (1983) 45
SEC v. Chenery Corp., 332 U.S. 194 (1947) 23, 29
Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 29, 32
Touby v. United States, 500 U.S. 160 (1991) 25, 32, 34
United States v. Lopez, 514 U.S. 549 (1995) 31
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) 28
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 42
Wyoming Outdoor Council v. United States Forest Service, 165 F.3d 43 (D.C. Cir. 1999) 39
Yakus v. United States, 321 U.S., 414 (1944) 32
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 31
Zemel v. Rusk, 381 U.S. 1 (1965) 25

STATUTES

The Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1994 & Supp. III 1997) 1
CAA § 101, 42 U.S.C. § 7401 34
CAA § 101(b), 42 U.S.C. § 7401(b) 1, 24
CAA § 107(d), 42 U.S.C. § 7407(d) 42, 43, 44, 45
CAA § 107(d)(1), 42 U.S.C. § 7407(d)(1) 43
CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A) 3
CAA § 107(d)(1)(B), 42 U.S.C. § 7407(d)(1)(B) 3
CAA § 107(d)(3), 42 U.S.C. § 7407(d)(3) 42, 43
CAA § 107(d)(4), 42 U.S.C. § 7407(d)(4) 42, 43, 44, 45
CAA § 108, 42 U.S.C. § 7408 ..... 3, 22, 35, 49
CAA § 108(a), 42 U.S.C. § 7408(a) 2
CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) 3
CAA § 109, 42 U.S.C. § 7409 ..... 21, 24, 28, 34, 35
CAA § 109(b), 42 U.S.C. § 7409(b) 3, 22, 49
CAA § 109(d), 42 U.S.C. § 7409(d) 3, 36, 38, 46, 49, 50
CAA § 110(a), 42 U.S.C. § 7410(a) 4
CAA § 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I) 4
CAA §§ 171-179B, 42 U.S.C. §§ 7501-7509a 4
CAA § 172(a), 42 U.S.C. § 7502(a) 44
CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C) 4, 43
CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D) 43
CAA § 175A(d), 42 U.S.C. § 7505a(d) 5
CAA § 181, 42 U.S.C. § 7511 43
CAA § 181(a), 42 U.S.C. § 7511(a) 37, 42, 44, 45, 46, 48, 49
CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) 43, 45
CAA § 181(b), 42 U.S.C. § 7511(b) 37, 44, 46, 48
CAA § 181(b)(1), 42 U.S.C. § 7511(b)(1) 43
CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f 5

CAA § 182, 42 U.S.C. § 7511a 5
CAA § 182(a)-(e), 42 U.S.C. § 7511a(a)-(e) 48
CAA §§ 182-185B, 42 U.S.C. §§ 7511a-7511f 1
CAA § 183(g), 42 U.S.C. § 7511b(g) 48
CAA § 184, 42 U.S.C. § 7511c 48
CAA § 184(a), 42 U.S.C. § 7511c(a) 5
CAA § 184(b)(1)(a), 42 U.S.C. § 7511c(b)(1)(a) 5
CAA §§ 186-187, 42 U.S.C. §§ 7512-7512a 46
CAA § 188-190, 42 U.S.C. § 7513-7513b 46
CAA § 191, 42 U.S.C. § 7514 46
CAA § 307(b), 42 U.S.C. § 7607(b) 1, 39, 40, 41
CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) 38
CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3) 13
CAA § 307(d)(9), 42 U.S.C. § 7607(d)(9) 23

FEDERAL REGULATIONS

40 C.F.R. § 50.9(b) (1999) 1, 18, 21, 37, 39
40 C.F.R. § 50.10 (1999) 18, 21, 37

FEDERAL REGISTER

43 Fed. Reg. 26964 (1978) 7
52 Fed. Reg. 24634 (1987) 6
52 Fed. Reg. 24642 (1987) 7
57 Fed. Reg. 13525 (1992) 48
58 Fed. Reg. 13008 (1993) 6
58 Fed. Reg. 13015 (1993) 7
61 Fed. Reg. 65659 (1996) 17
62 Fed. Reg. 38421 (1997) 17
62 Fed. Reg. 38424 (1997) 39
62 Fed. Reg. 38653 (1997) 7, 16

62 Fed. Reg. 38656 (1997) 6
62 Fed. Reg. 38665 (1997) 7
62 Fed. Reg. 38670 (1997) 15, 17
62 Fed. Reg. 38675 (1997) 17, 27
62 Fed. Reg. 38676 (1997) 12
62 Fed. Reg. 38683 (1997) 17
62 Fed. Reg. 38683-95 (1997) 16
62 Fed. Reg. 38688 (1997) 17, 18, 21, 27
62 Fed. Reg. 38857 (1997) 7, 16
62 Fed. Reg. 38858 (1997) 17
62 Fed. Reg. 38863 (1997) 7
62 Fed. Reg. 38867 (1997) 9
62 Fed. Reg. 38868 (1997) 17, 27
62 Fed. Reg. 38873 (1997) 18
62 Fed. Reg. 38877 (1997) 17
62 Fed. Reg. 38878-85 (1997) 16
62 Fed. Reg. 38883 (1997) 17, 18, 21, 27
62 Fed. Reg. 38884-85 (1997) 18
62 Fed. Reg. 38894-95 (1997) 18

LEGISLATIVE HISTORY

136 Cong. Rec. 130 (Jan. 23, 1990), *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) (Sen. Chafee) 4, 47
136 Cong. Rec. H12867 (daily ed. Oct. 26, 1990) (Rep. Fields), *reprinted in* 1 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) 47

H.R. 3030, 101st Cong., §§ 101(a), 103, *reprinted in* 2 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) 45
H.R. Rep. No. 101-490, pt. 1 (1990), *reprinted in* 2 Sen. Comm. on Env't and Pub. Works, 101st Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) 4, 45, 47, 48
H.R. Rep. No. 101-952 (1990), *reprinted in* 1 Sen. Comm. on Env't and Pub. Works, 103d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) 4, 45
S. Rep. No. 91-1196 (1970), *reprinted in* 1 Sen. Comm. on Pub. Works, *A Legislative History of the Clean Air Amendments of 1970* (Comm. Print 1974) 40
S. 1630, 101st Cong., §§ 101, 107, *reprinted in* 3 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990* (Comm. Print 1993) 45

MISCELLANEOUS

Committee on the Institutional Means for Assessment of Risks to Public Health, National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983) 26
EPA, *Air Quality Criteria for Particulate Matter* (1996) 11, 12, 13

EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* (1997) 15
EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* (July 1997) 16
EPA, *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* (July 1997) 16
EPA, *Review of National Ambient Air Quality Standards for Ozone* (1996) 6, 7, 9
EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter* (1996) 11, 12, 13, 14
Gary Taubes, *Epidemiology Faces Its Limits*, 269 Science 164 (1995) 12
L. Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399 (April 2000) 29, 35
Leland Deck, et al., *A Particulate Matter Risk Assessment for Philadelphia and Los Angeles* (1996) 14
Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995) 8, 9, 10
Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Jun. 13, 1996) .. 11, 14, 15
Memorandum from Harvey M. Richmond to Karen Martin (Feb. 11, 1997) 9
U.S. Dep't of Commerce, *Statistical Abstract of the United States* (119th ed. 1999) 15, 16

W. Wilson, *Congressional Government* (1885).....30

GLOSSARY

The following is a glossary of acronyms and abbreviations used in this brief.

Act	Clean Air Act
Administrator	Administrator of the United States Environmental Protection Agency
Agency	United States Environmental Protection Agency
APC	Appalachian Power Co., *et al.*
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
OJA	Joint Appendix in D.C. Cir. Case No. 97-1441
OSP	Ozone Staff Paper

PM	Particulate Matter
PM_{10}	Particulate Matter with an aerodynamic diameter less than or equal to 10 microns
$PM_{2.5}$	Particulate Matter with an aerodynamic diameter less than or equal to 2.5 microns
PMJA	Joint Appendix in D.C. Cir. Case No. 97-1440
PPM	Parts Per Million
PMSP	Particulate Matter Staff Paper
Subpart 1	Subpart 1 of Part D of Title I of the Clean Air Act
Subpart 2	Subpart 2 of Part D of Title I of the Clean Air Act

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following additional statutory and regulatory provisions are involved in this case: CAA §§ 101(b), 182-185B, and 307(b); 40 C.F.R. § 50.9(b).[1]

STATEMENT OF THE CASE

A fundamental principle of our system of government is that executive branch agencies may exercise only that power that Congress has delegated to them. While Congress often delegates in broad terms in areas that are technically and scientifically complex, that delegation must specifically provide—or the executive branch agency must derive from the authorizing legislation—an intelligible principle that constrains the agency's discretion in a manner consistent with the congressional delegation. Just as no executive branch agency may exercise a policy judgment that Congress has not delegated to it, no executive branch agency may substitute its policy judgment for that of Congress.

The actions of the Environmental Protection Agency ("EPA" or "the Agency") at issue here violate this principle. In 1997, citing the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401 *et seq.*, and the policy judgment of its Administrator, EPA replaced existing National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM") with revised standards. In each instance, while EPA characterized ranges of health risks associated with alternative standards, the Agency did not articulate any principle based on the Act to guide its exercise of risk

---

[1] These provisions are reproduced in the attached Appendix ("App.___"), or the Appendix to Conditional Cross-Pet. in Case No. 99-1431.

management judgment in selecting standards from that range of risks. By revising the ozone NAAQS, EPA also replaced the statutory program for reducing ozone enacted by Congress in 1990 with a more stringent program of EPA's own creation.

Because EPA's actions are incompatible with the scope of authority delegated to that Agency by Congress, they must be vacated. The Court should instruct EPA that Congress has not authorized it to establish a more stringent ozone NAAQS and that, in promulgating a NAAQS, it must articulate the principle, based on the Act, that it applies in exercising its risk management judgment.[2]

I. THE STATUTORY SCHEME.

A. The NAAQS Program.

The NAAQS program is the centerpiece of the Clean Air Act. It requires a joint effort by EPA and the States, with EPA responsible for establishing NAAQS and the States responsible for implementing them.

NAAQS apply to air pollutants that EPA finds "may reasonably be anticipated to endanger public health or welfare" and that result from "numerous or diverse" mobile and stationary sources. CAA § 108(a). Prior to setting standards, EPA must prepare a "criteria document" that "accurately reflects the latest scientific knowledge useful in

[2] While the reviewing court correctly objected to EPA's construction of the statute as providing no intelligible principle for risk management decisions, as Appalachian Power Co., *et al.*, ("APC") and American Trucking Associations, Inc., *et al.*, ("ATA") explain in Case No. 99-1426, the Act provides the basis for such a principle. Acceptance of the arguments in Case No. 99-1426 regarding the proper construction of the Act would require that the revised standards at issue here be vacated.

indicating the kind and extent of all identifiable effects on public health or welfare" of varying quantities of the pollutant in the ambient air. CAA § 108(a)(2); s*ee also* Br. for Resp'ts Appalachian Power Co., *et al.*, in Support of Pet'rs (99-1426) 6, 37-39 [hereinafter "APC Br."].

Based on the criteria document, the Agency sets "primary" NAAQS at a level "requisite to protect the public health" with an "adequate margin of safety," and "secondary" NAAQS at a level "requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b). NAAQS may be revised "as may be appropriate" in accordance with §§ 108 and 109(b). CAA § 109(d); *see* APC Br. 39-42.

In promulgating or revising NAAQS, EPA must consult an independent scientific review committee—the Clean Air Scientific Advisory Committee ("CASAC")—that advises the Agency on (1) the "adequacy" and "basis" for existing and revised NAAQS, (2) "the relative contribution to air pollution concentrations of natural as well as anthropogenic activity," and (3) "any adverse public health, welfare, social, economic, or energy effects" from different approaches to NAAQS implementation. CAA § 109(d).

B. Application and Enforcement of NAAQS.

In order to implement a NAAQS, States are responsible for identifying and submitting to EPA a list of areas to be designated "attainment" (meeting the standard), "nonattainment" (not meeting the standard), or "unclassifiable." CAA § 107(d)(1)(A). EPA then promulgates these designations, making "such modifications as the Administrator deems necessary." CAA § 107(d)(1)(B). At that time, EPA "may classify" nonattainment areas to provide an attainment date or "for other purposes" *unless* "classifications are specifically

provided under other provisions" of the Act. CAA § 172(a)(1)(C).

Once areas are designated and, if appropriate, classified pursuant to the Act, States are responsible for adopting State Implementation Plans ("SIPs") that provide for "implementation, maintenance, and enforcement" of the NAAQS. CAA § 110(a). For areas that are designated nonattainment, the SIP must "meet the applicable requirements of Part D." CAA § 110(a)(2)(I). General requirements for nonattainment area plans are found in Subpart 1 of Part D of Title I of the Act. CAA §§ 171-179B.

In 1990, Congress recognized that, for a variety of reasons, the general classification and planning provisions of Part D of the Act were not appropriate to address ozone nonattainment and ozone "maintenance" based upon the established 1-hour ozone NAAQS.[3] Reflecting the failure of many areas to attain the ozone NAAQS,[4] as well as Congress' determination that massive economic dislocation and impossible deadlines driven by the general planning provisions were neither necessary nor appropriate responses to ozone health risks,[5] Congress in 1990 designated the 1977

---

[3] H.R. Rep. No. 101-952, at 335 (1990), *reprinted in* 1 Sen. Comm. on Env't and Pub. Works, 103d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1990*, at 1785 (Comm. Print 1993) [hereinafter *1990 Legis. Hist.*], OJA 3546; *see also* H.R. Rep. No. 101-490, pt. 1, at 146-49 (1990), *reprinted in* 2 *1990 Legis. Hist., supra,* 3170-72, OJA 3557-59; 136 Cong. Rec. 130-33 (Jan. 23, 1990), *reprinted in* 4 *1990 Legis. Hist., supra*, 4832-39 (Sen. Chafee); APC Br. 15-17.

[4] H.R. Rep. No. 101-490, pt. 1, at 229-31, *reprinted in* 2 *1990 Legis. Hist., supra* note 3, at 3253-55, OJA 3590-3600.

[5] *See supra* note 3.

Amendments' General Provisions "Subpart 1" of Part D of Title I of the Act, and added a new Subpart 2 to Part D of Title I. Subpart 2 "specifically provide[s]" for ozone classifications and, based on those classifications, for detailed regulatory requirements that Congress had concluded would represent a pragmatic solution to reducing ozone concentrations throughout the country. *See* CAA §§ 181-185B.

Subpart 2 comprehensively addresses classification of areas and control programs for ozone. It explains how areas designated nonattainment for ozone are to be regulated, and includes specific regulatory programs for volatile organic compounds and nitrogen oxides, substances that contribute to ozone formation. *See, e.g.*, CAA § 182.

Subpart 2 also imposes requirements on areas that attain the ozone NAAQS. As an example of the specificity of the balances struck by Congress even for "attainment areas," each metropolitan area with a population of 100,000 or greater in the Northeastern States "ozone transport region" established by Congress in Subpart 2 must adopt an enhanced vehicle inspection and maintenance program. CAA § 184(a), (b)(1)(A). And nonattainment areas that achieve attainment are subject to "maintenance plans" that "include a requirement that [if the NAAQS is again violated,] the State will implement all measures [including Subpart 2 requirements]. . . . that were contained in the State implementation plan for the area before redesignation" to attainment. CAA § 175A(d).

In short, Congress "stood up to the plate" in Subpart 2 and defined a risk management program to resolve the health risks from ozone, rather than continuing the politically "feel good" deadlines and control strategies that failed under Subpart 1. Subpart 2 is Congress' comprehensive and long-

term program to reduce health risks associated with ozone concentrations in the ambient air.

II. THE 1997 OZONE AND PM NAAQS REVISIONS.

Both ozone and PM have been the subject of NAAQS since the beginning of the ambient standards program. Ozone has been subject to a 1-hour NAAQS of 0.12 ppm that EPA established in 1979 and reaffirmed in 1993 as protective of public health with an adequate margin of safety. 58 Fed. Reg. 13008, OJA 3449. PM has been subject to annual and 24-hour NAAQS that use PM_{10} as a size indicator, and that were adopted in 1987 in place of earlier, less stringent standards measuring PM as Total Suspended Particulate (TSP). 52 Fed. Reg. 24634, PMJA 208.

In its brief, EPA asserts that scientific evidence that has emerged since these NAAQS were last reviewed shows that the existing standards fail to protect "millions of Americans from adverse health effects." EPA Br. 2. According to EPA, "a wide range of adverse health effects *were occurring* at concentrations below the pre-existing PM and ozone NAAQS." *Id.* 31 (emphasis added). But these assertions are not the stated basis for the revised NAAQS and, indeed, do not reflect the rulemaking records.[6]

Far from reflecting a response to demonstrated adverse public health effects, EPA's rulemaking determinations represent a "policy choice" to provide more "margin of safety" in light of "uncertainties associated with inconclusive scientific and technical information" and "hazards that

[6] 62 Fed. Reg. 38656, PMJA 6 (PM risk estimates "should not be viewed as demonstrated health impacts"); *see also* EPA, *Review of National Ambient Air Quality Standards for Ozone* 104 (1996) [hereinafter *OSP*], OJA 1914 (ozone risk estimates are not "demonstrated health impacts").

research has not yet identified." 62 Fed. Reg. 38857, OJA 2; *id.* 38653, PMJA 3.[7] This is because, contrary to EPA's assertions, the rulemaking records contain estimates of health *risk,* not demonstrated adverse public health effects that are occurring as a result of exposure to these pollutants.[8] The existence of such risks was recognized in previous NAAQS proceedings and, as EPA's risk assessments show, are also addressed by the existing NAAQS.[9]

As a result, as the record of these proceedings and the Agency's decisions show, this case is *not* about whether or not EPA can regulate based on predictions of health risk. Rather, it is about EPA's failure to exercise reasoned public health risk management judgment as to the level of protection that is "appropriate" among a range of "risk" options.

A. The Administrative Record on Ozone.

Reflecting that the rulemaking to revise the ozone NAAQS was based on small, predicted health risks, the

[7] *See also* EPA Br. (D.C. Cir. 97-1441) 35 (EPA "appropriately applied margin of safety considerations in choosing among options."); *id.* 48.

[8] *See, e.g.,* 62 Fed. Reg. 38665, PMJA 15 ("[T]he Administrator believes that it is more appropriate to provide additional protection against the risk posed by PM by adding new standards for the fine fraction of PM_{10}."); *id.* 38863, OJA 8 (explaining that the Administrator sought to reduce risk).

[9] *See* 58 Fed. Reg. 13015, OJA 3456 (lung function changes even on days when the NAAQS was not exceeded); 52 Fed. Reg. 24642, PMJA 216 (noting the data suggest a "continuum of response" with the risk "decreasing with concentration"); *see also OSP*, *supra* note 6, at 24, OJA 1834 ("Prior to completion of the previous review . . . there was a substantial data base defining health effects of [ozone]."); 43 Fed. Reg. 26964, OJA 3518 (discussing range of health risks considered in establishing 1979 NAAQS). Nor do the revised standards eliminate the risk. EPA has not identified any level that is without risk for either pollutant.

Administrator's science advisers (CASAC) questioned the need for the revised ozone NAAQS. As CASAC concluded:

> [T]here is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedences) as being significantly more protective of public health. For example, the differences in the percent of outdoor children . . . responding between the present standard and the most stringent proposal . . . *are small and their ranges overlap for all health endpoints*.[10]

The administrative record on ozone sheds light on CASAC's concerns regarding appropriate standard revisions. The record shows that, while attaining the existing 1-hour ozone NAAQS would not eliminate all health risk associated with exposure to ozone, a new NAAQS would not necessarily reduce the remaining risk, and might even increase it. The question EPA confronted therefore was what level of health "risk" is "requisite" to protect the "public health" given this record.

EPA's own risk assessment found that the range of estimated risk (expressed as the number or percent of individuals in the sensitive population (outdoor children)[11]

---

[10] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (Nov. 30, 1995) [hereinafter CASAC Ozone Letter], OJA 238 (emphasis added). EPA is simply wrong when it states that CASAC "did not mean" that "the public health effects were the same at any level" within the range. *See* EPA Br 33 n.23.

[11] Because the risk assessment focuses on the sensitive subpopulation and because it took into account the full range of dose/response information contained in the health studies, it reflects responses by sensitive, as well as typical, individuals.

predicted to respond to ozone at least once a year) overlapped with the range of estimated risk if EPA retained the existing standard.[12] The overlap occurred for all the various types of health effects that were analyzed. In fact, for approximately one-third of the population evaluated, the new standard could place the population at greater risk than if the standard remained unchanged.[13]

Thus, EPA staff acknowledged that ranges of estimated risk were little different for the 1-hour and 8-hour ozone NAAQS.[14] In fact, the staff concluded that an 8-hour NAAQS of 0.09 ppm (which they indicated would be roughly equivalent to the 1-hour NAAQS) "would reduce estimated exposures of the at-risk population sufficiently to provide some margin of safety."[15]

CASAC agreed. The Committee endorsed the full range of options suggested by the staff, including no increase in the

---

[12] *See* CASAC Ozone Letter, *supra* note 10, at 3, OJA 238. Moreover, this risk assessment did not even comprehensively address the uncertainties in the data. APC Br. 11 & nn.16-20; *see also* CASAC Ozone Letter, *supra* note 10, at 2, OJA 237 (large uncertainties exist in the risk estimates); *OSP*, *supra* note 6, at 55, OJA 1865 (noting that children do not appear to experience the symptoms from ozone exposure that are modeled in the risk assessment).

[13] 62 Fed. Reg. 38867, OJA 12; *OSP*, *supra* note 6, at 80, OJA 1891. Similarly, asthmatic hospital admissions in New York City were predicted either to decrease slightly (0.2%) or increase slightly (0.03%) depending on the form of the 0.08 ppm 8-hour standard. (EPA selected a form for the standard that was between the two options evaluated.) *See* Non-State CAA Pet'rs and Intervenors' Br. (D.C. Cir. 97-1441) 52.

[14] *OSP*, *supra* note, 6, at 125, 130, OJA 1935, 1940; Memorandum from Harvey M. Richmond to Karen Martin 5 (Feb. 11, 1997), OJA 2318.

[15] *OSP*, *supra* note 6, at 167, OJA 1977; *see also* APC Br. 10-13, for further discussion of the ozone record.

stringency of the standard.[16] In fact, of the ten CASAC panel members who expressed their opinions, four specifically recommended an 8-hour NAAQS no more stringent than the existing NAAQS and three others included 0.09 ppm within their recommended range.[17] Because of overlapping risk estimates, CASAC indicated that EPA's selection of a specific standard would have to reflect "policy judgment."[18]

But what decisional standard would govern that "policy judgment"? CASAC provided no answer and was even told by EPA not to provide information called for by the Act (e.g., "implementation impacts") that could inform that policy judgment.[19]

B. The Administrative Record on PM.

Although recommending the adoption of a NAAQS for fine PM, CASAC noted "the many unanswered questions and uncertainties regarding the issue of causality" of health effects by the pollutant, which created uncertainty about the level of health protection under a revised standard. These

[16] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238.

[17] *Id.*, OJA 238. Thus, whatever concerns CASAC may once have had with the adequacy of the protection provided by the existing standard, *see* EPA Br. 13 (citing a letter written by CASAC in 1989), after reviewing the latest scientific information as presented in the *OSP* and Criteria Document the majority of CASAC was comfortable with recommending a standard at the stringency of the existing one.

[18] CASAC Ozone Letter, *supra* note 10, at 3, OJA 238.

[19] *Compare* CASAC Tr. (3/21/95), 36-39, OJA 253-54 (EPA's Gleason states that CASAC's responsibilities concerning implementation strategies are "irrelevant to how we set standards"), *with* CASAC Tr. (3/19/95), 37-38, OJA 285-86 (CASAC member Price notes a "bit of a conflict" with EPA in that there "is not that review" of the "the interface of science and control strategy issues" called for by the Act).

uncertainties affecting EPA's risk characterization included: "exposure misclassification, measurement error, the influence of confounders, the shape of the dose-response function, . . . the lack of an understanding of toxicological mechanisms, and *the existence of possible alternative explanations*."[20] As a result, CASAC was unable to form a consensus on appropriate NAAQS for fine PM.[21]

Confirming CASAC's concerns, EPA staff "emphasize[d] the *unusually large uncertainties*" associated with establishing standards for $PM_{2.5}$.[22] These uncertainties included the "lack of demonstrated mechanisms" that "limits judgments about causality of effects and appropriate concentration-response models to apply in quantitatively estimating risks" associated with $PM_{2.5}$.[23]

EPA staff also acknowledged "the question as to whether or to what extent the observed effects attributed to PM exposures are confounded by other pollutants commonly occurring in community air."[24] The EPA staff noted that

[20] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner 3 (June 13, 1996) [hereinafter CASAC PM Letter], PMJA 3163 (emphasis added).

[21] *Id.* 2, PMJA 3162.

[22] EPA, *Review of the National Ambient Air Quality Standards for Particulate Matter* VII-41 (1996) [hereinafter *PMSP*], PMJA 2153 (emphasis added).

[23] *Id.* VII-42, PMJA 2154.

[24] *Id.*, PMJA 2154. A "confounder" in an epidemiological study is an "independent risk factor [e.g., another pollutant] for the outcome" (e.g., mortality) that is "associated with the exposure variable" (e.g., ambient PM). EPA, *Air Quality Criteria for Particulate Matter* 12-24 (1996) [hereinafter *PMCD*], PMJA 1398. Failure to consider a "confounder" in

several authors "have demonstrated that it may not be possible to separate individual effects of multiple pollutants."[25] The staff recognized that, even when statistically significant, reported associations between particulate matter and health effects were "weak" and the "'relative risks'" were "consistently 'small'"[26]—indeed, so small that epidemiologists are generally reluctant to believe such risk findings.[27]

Furthermore, while EPA emphasizes that a number of epidemiological studies addressed PM effects, EPA Br. 9, most of those studies involved PM size fractions other than the $PM_{2.5}$ fraction that EPA chose to regulate.[28] And most of

---

an epidemiological study may produce inaccurate or exaggerated associations with the variable of concern (i.e., PM).

[25] *PMSP, supra* note 22, at VII-42 to VII-43, PMJA 2154-55.

[26] *PMCD, supra* note 24, at 12-346 to 12-347, PMJA 1720-21.

[27] *See* Gary Taubes, *Epidemiology Faces Its Limits*, 269 Science 164, 168 (1995), PMJA 3134. While EPA argues that the concept of statistical significance can be used to separate associations that "may reflect cause-and-effect relationships" from those that may be the product of "chance," EPA Br. 9 n.10, statistical significance "only takes into consideration random variation in the data. It ignores the systematic errors, the biases and confounders, that will almost invariably overwhelm the statistical variation." Taubes, *supra*, at 168, PMJA 3134 (*citing* Norman Breslow, University of Washington). In short, the existence of a statistically significant association does not establish either causality or the significance of health risk.

[28] *See* 62 Fed. Reg. 38676, PMJA 26 (*citing PMSP, supra* note 22, at V-60b to V-60c, V-61a, PMJA 2023-24, 2026). While several studies are listed in the tables relied on by EPA, only Schwartz, *et al.* (1996), Thurston, *et al.* (1994), Schwartz, *et al.* (1994), Dockery, *et al.* (1993), and Pope, *et al.* (1995) reported a statistically significant relationship with $PM_{2.5}$. Two studies in those tables reported no statistically significant association between $PM_{2.5}$ and the studied effects, Ostro, *et al.*

those studies ignored the important effect of confounders (e.g., the presence of other pollutants or other variables that could have produced the effect). *See supra* note 27.

The record showed that in six of seven studies in which confounders were fully analyzed, the initial association reported between PM and health effects lost statistical significance.[29] As the staff acknowledged, therefore, studies that failed to consider a full array of confounders "probably overestimate[d] the PM effect."[30] Yet, during the rulemaking, EPA consistently denied to the public data needed to analyze the role of confounders in the critical $PM_{2.5}$ studies.[31]

Although EPA put forward quantitative projections of the health impacts of low levels of $PM_{2.5}$, the uncertainties in the science were so great that Agency staff warned that its "risk estimates . . . should *not* be interpreted as precise measures of risk."[32] Similarly, CASAC noted that the risk assessment did

---

(1993) and Neas, *et. al.* (1995). The daily $PM_{2.5}$ levels were as high in the studies that did not report statistical significance as in the ones that did.

[29] *See* Non-State Fine PM Pet. Br. (D.C. Cir. 97-1440) 17.

[30] *PMCD, supra* note 24, at 12-333, PMJA 1707.

[31] EPA did not make the data available even though EPA itself had funded the most critical studies and despite a requirement that "the factual data on which the proposed rule is based" be placed in the public docket. *See* CAA § 307(d)(3). EPA's failure to place these data in the docket, and its implications for the validity of the $PM_{2.5}$ standards, was one of the issues that the lower court said it would resolve only after EPA responded to the court's remand. Non-State Fine PM Pet. Br. (D.C. Cir. 97-1440) 33-44; 175 F.3d 1034, Pet. App. 5a.

[32] *PMSP, supra* note 22, at VI-1, PMJA 2051 (emphasis added). Among the uncertainties acknowledged by EPA staff were "uncertainties in the concentration-response" relationship, use of ambient concentrations "as a

not include all of the uncertainties and that the combined effect of those uncertainties was not examined.[33] Thus, EPA's risk assessment was simply "premised *on the assumption* that PM (measured as PM_{10} and $PM_{2.5}$) is causally related to the health effects observed in the epidemiological studies and/or that PM is a useful index for the mixture of pollutants that is related to these effects."[34]

For these reasons, CASAC observed that EPA's risk assessments were of "limited value" for identifying an appropriate standard[35] and noted "the existence of possible alternative explanations" for the effects examined in the risk assessment.[36] While most of the science advisers endorsed the concept of a $PM_{2.5}$ standard, only 2 of 21 specifically recommended an annual NAAQS as stringent as the one EPA

---

surrogate for population exposures," the lack of site-specific risk estimates for $PM_{2.5}$, and uncertain estimates of baseline incidence of hospital admissions and respiratory symptoms. *Id.* at VI-1, VI-7, VI-14, VI-21, PMJA 2051, 2058, 2066, 2073. EPA assumed there was no threshold for the effects. *PMSP, supra* note 22, at VI-16; PMJA 2068.

[33] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163; *see also* Leland Deck, *et al., A Particulate Matter Risk Assessment for Philadelphia and Los Angeles* 105 (1996), PMJA 3362 (co-pollutants were not addressed).

[34] *PMSP*, *supra* note 22, at VI-1, PMJA 2051 (emphasis added). However, CASAC noted "the many unanswered questions and uncertainties regarding the issue of causality." CASAC PM Letter, *supra* note 20, at 3, PMJA 3163.

[35] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163. EPA's reliance on this risk assessment to quantify health effects from PM concentrations below the previous standards, EPA Br. 2, is therefore unwarranted.

[36] CASAC PM Letter, *supra* note 20, at 3, PMJA 3163.

chose to make its controlling standard.[37] In an observation that reflected the nature of the record, CASAC also noted that any decision on NAAQS revision would require "policy judgments."[38]

C. The Impacts of Standard Revision.

In contrast to the uncertain health risk and inconclusive science on which the Administrator's decisions were based, the ozone and PM NAAQS revisions would impose real and substantial burdens on society. For example, EPA observed in its regulatory impact assessment that the revised standards would create implementation difficulties and may be unachievable in many areas.[39] Nevertheless, the Agency estimated that the revised ozone and PM NAAQS could together cost as much as $47 billion annually.[40] Others (including the Council for Economic Advisors) estimated that the revised NAAQS would be even more expensive. *See* APC Br. 17-19. By comparison, only $18 billion were spent on medical research in the U.S. the year the NAAQS were promulgated. *See* U.S. Dep't of Commerce, *Statistical Abstract of the United States* 118, Table 163 (119th ed. 1999). Of this, $16.5 billion were government sponsored,

---

[37] *Id.* at 5, PMJA 3165; *see also* 62 Fed. Reg. 38670, PMJA 20 (explaining the annual NAAQS will be "the generally controlling standard").

[38] CASAC PM Letter, *supra* note 20, at 4, PMJA 3164. As with ozone, however, *see supra* note 19, EPA's science advisers did not address factors such as implementation impacts that could have informed EPA's policy judgment.

[39] EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, 7-2, 7-5 (1997), OJA 2919, 2930-31.

[40] *Id.* ES-12 to ES-13, OJA 2919-20.

and $1.5 billion were privately sponsored. *Id.* These figures illuminate the disparity between the investments that would be compelled in this case to address uncertain health risks and the government's total investment in medical research directed at demonstrated adverse public health effects.

D. The Administrator's Decisions.

The Ozone and PM NAAQS–The Administrator explained that her decisions to revise the NAAQS reflected her judgment as to how much protection is "sufficient[]" in light of "uncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified." 62 Fed. Reg. 38857, OJA 2; *id.* 38653 PMJA 3. But rather than explain what principles guided her exercise of "policy judgment" in selecting among regulatory options based upon uncertain predictions of risk, the Administrator addressed at length the factors that did *not* guide her judgment. These factors, which could have provided a principled approach to making risk management decisions, included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards.[41]

The Administrator did explain the factors that she used to characterize the health risk associated with PM and ozone. These included "the nature and severity of the health effects

[41] 62 Fed. Reg. 38878-85, OJA 23-30; *id.* 38683-95, PMJA 33-45; EPA, *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), OJA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July 1997), PMJA 312.

involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed."[42]

Based on these factors and the scientific record described above, the Agency presented ranges of risks for alternative standard levels.[43] For ozone, EPA selected a revised standard from this range at a level that, in the Agency's judgment, reflected the level at which "public health impacts . . . [are] important and sufficiently large as to warrant a standard."[44] For PM, EPA selected the 15 $\mu g/m^3$ annual $PM_{2.5}$ NAAQS on the grounds that the evidence for health risk below that level was too uncertain.[45]

[42] *See* 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38.

[43] For ozone, it identified a range of standards from 0.09 ppm (which it equated to the existing 1-hour NAAQS) to 0.07 ppm. 62 Fed. Reg. 38858, OJA 3. For the annual $PM_{2.5}$ standards (the controlling $PM_{2.5}$ standard), *id.* 38670, PMJA 20, EPA identified a range of 12 $\mu g/m^3$ to 20 $\mu g/m^3$. 61 Fed. Reg. 65659, PMJA 140. The range proposed for the 24-hour $PM_{2.5}$ standard was 20 $\mu g/m^3$ to 65 $\mu g/m^3$. *Id.*, PMJA 140. The Agency set secondary NAAQS for both ozone and $PM_{2.5}$ at the level of the primary NAAQS. 62 Fed. Reg. 38877, OJA 22; *id.* 38683, PMJA 33.

[44] 62 Fed. Reg. 38868, OJA 13; *see also* EPA Br. (D.C. Cir. 97-1441) 41 (A 0.09 ppm standard "would not adequately address the uncertainties concerning…chronic effects," while "uncertainties concerning chronic effects were too great to warrant selection of the second- or third-highest forms" of a 0.08 ppm standard.); *id.* 42-43 (EPA is not required "to make any specific 'findings,'" not even a finding that regulatory action is needed to protect against a "significant risk of harm.").

[45] *See* 62 Fed. Reg. 38675, PMJA 25; EPA Br. 11. Reflecting the uncertainty and sizable impacts, the President ultimately instructed EPA to complete a further review of the science prior to implementing these standards. 62 Fed. Reg. 38421, PMJA 195.

What the Agency did *not* do was to articulate a principle based on the statute for *managing* those risks—i.e, a principle that explains why certain risks were "sufficiently large" to require regulation or how much uncertainty is too much.[46] The Agency did not articulate a principle that a court could use for assessing whether the resulting standard is reasonable.[47]

Subpart 2—In its "[f]inal decision on the primary standard" for ozone, EPA explained how "the Act should be interpreted" regarding the interplay of Subpart 2 and EPA's ozone NAAQS revision authority. As EPA explained, "the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard." At that time, the 1-hour standard and Subpart 2 "will no longer apply to that area." 62 Fed. Reg. 38873, OJA 18 (final decision); *see id.* 38884-85, OJA 29-30 (response to comments). EPA therefore concluded that it had statutory authority to adopt a more stringent ozone NAAQS that would override the comprehensive Subpart 2 ozone risk management program adopted by Congress for ozone attainment, nonattainment, and maintenance areas. Based on that interpretation, EPA promulgated regulatory provisions (40 C.F.R. §§ 50.9(b), 50.10) that "replac[ed] the existing 1-hour [standard]. . . with a new [more stringent] 8-hour [standard]." 62 Fed. Reg. 38873, 38894-95, OJA 18, 39-40.

---

[46] *See* 175 F.3d 1036, Pet. App. 10a.

[47] *See, e.g.*, 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38; *see also* EPA Br. 28-29 (requiring consistent decisional criteria is "inconsistent with EPA's own expert assessment of the flexibility necessary to apply Section 109's mandate to all the pollutants for which EPA must develop standards").

III. THE D.C. CIRCUIT DECISIONS.

Faced with EPA's failure to articulate an intelligible principle to guide its exercise of public health risk management judgment, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit held (with Judge Tatel dissenting) that EPA's interpretation of the Clean Air Act would render the Act's applicable provisions an unconstitutional delegation of legislative power. 175 F.3d 1034, Pet. App. 5a. Because the court believed that these provisions might be subject to an interpretation that would not violate the nondelegation doctrine, however, the court remanded both revised NAAQS to EPA. The court directed EPA to develop a construction of the Act that would provide an intelligible principle for EPA's exercise of risk management judgment.[48]

In remanding the NAAQS, however, the court tied EPA's hands in developing this "intelligible principle." The lower court did this by reaffirming the D.C. Circuit's previous interpretations of the Act to preclude EPA from relying on many factors that the Agency otherwise should have considered to guide its risk management judgment when promulgating NAAQS.[49]

The panel also unanimously held that there was no ambiguity that Congress intended implementation of an

---

[48] Because it concluded that EPA's interpretation of the Act was flawed, the lower court left unanswered critical questions concerning EPA's interpretation of the science. *See supra* note 31. Thus, it is misleading for the American Lung Association to state that the court "did not . . . question the validity of the science relied upon by EPA . . . ." ALA Br. 11.

[49] Those interpretations of the Act are fully briefed in Case No. 99-1426.

ozone NAAQS to proceed under Subpart 2, and agreed with petitioners that Subpart 2 "must preclude the EPA from requiring areas to comply *either more quickly or with a more stringent ozone NAAQS*." 175 F.3d 1049, Pet. App. 40a (emphasis added).[50] The panel, however, refused to set aside the primary and secondary 8-hour standards, 175 F.3d 1057, Pet. App. 57a-58a, presumably restricting EPA's authority on remand to the promulgation of revised standards that would not be more stringent than the 1-hour standard.

In response to requests for rehearing and reconsideration *en banc*, the full circuit court declined to hear the case. The panel declined to modify its opinion on "nondelegation" or on consideration of the protective effects of a criteria pollutant. 195 F.3d 6, 10, Pet. App. 71a, 82a. After unanimously disagreeing with EPA's contention that it lacked jurisdiction over questions concerning the effect of Subpart 2, the panel, in an opinion and a partial concurrence, affirmed that the revised standard could be enforced "only in conformity with Subpart 2." *Id.* 10, Pet. App. 81a.

SUMMARY OF ARGUMENT

1. This case concerns the bedrock principle that an agency may act only within the limits of the authority delegated to it by Congress. Unless an agency can enunciate the limits of

[50] The court also unanimously remanded the ozone standards because EPA had failed to consider evidence that ozone in the ambient air is protective with regard to exposure to solar ultraviolet radiation that has been associated with skin cancer and cataracts. 175 F.3d. 1051-53, Pet. App. 44a-49a. Furthermore, the court vacated the Agency's new coarse PM standards because the Agency's chosen pollutant indicator, PM_{10}, was "poorly matched to the relevant pollution agent." *Id.* 1055, Pet. App. 53a. Neither of these holdings, which will require further rulemaking on remand, are before this Court.

that delegation, it is not possible for the court to evaluate the validity of its action and it is not possible for the agency to adopt rules that reflect "reasoned" decisionmaking.

In these rulemakings, EPA revised the ozone and PM NAAQS that were previously found "requisite to protect the public health" with an "adequate margin of safety." EPA made its decision based not on findings of demonstrated health effects, but rather based on the Administrator's evaluation of public health risks.

In promulgating the revised NAAQS, EPA described at length factors it used to characterize the risks at issue but was silent on how it went about *managing* those risks. According to the Administrator, her decision was "largely judgmental in nature . . . and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38883, OJA 28; *id.* 38688, PMJA 38. Yet, it is the formulation of this very policy judgment that Congress delegated to EPA under § 109 of the CAA. The absence of any explanation by EPA of the principle that guided that exercise of judgment, based on the authority delegated to it by Congress, renders EPA's actions unlawful.

2. EPA's argument that the courts have no jurisdiction to review EPA's resolution of whether Subpart 2 restricts its NAAQS revision authority is wrong. Respondents agree with EPA that its final ozone NAAQS rules, 40 C.F.R. §§ 50.9(b), 50.10, are facially inconsistent with the legislative program for managing ozone health risks. Under the CAA's pre-enforcement review scheme, and this Court's decision in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the court of appeals correctly reviewed the validity of these rules—a necessary element of which was the scope of EPA's authority to implement a revised, and more stringent,

ozone NAAQS in light of the comprehensive Subpart 2 program for managing ozone health risks.

3. The language of the statute, the legislative history, and the structure of the Act all make clear that Subpart 2 is Congress' exclusive, long-term program for managing ozone health risks. Because, as EPA concedes, EPA's more stringent revised ozone NAAQS cannot be implemented or enforced under Subpart 2, EPA's decision to revise the ozone NAAQS is neither "appropriate" in accordance with §§ 108 and 109(b) nor lawful, given the comprehensive statutory program.

ARGUMENT

I. EPA IMPROPERLY CONSTRUED THE STATUTE TO PROVIDE NO LEGAL STANDARD, OR "INTELLIGIBLE PRINCIPLE," THAT WOULD GUIDE ITS EXERCISE OF PUBLIC HEALTH RISK MANAGEMENT JUDGMENT.

In reviewing EPA's decisions to revise the ozone and PM NAAQS, the D.C. Circuit invoked the so-called "weak" form of the nondelegation doctrine. 175 F.3d 1038, Pet. App. 14a (distinguishing the "strong" form). This is not a doctrine used by courts to declare statutes unconstitutional.[51] To the contrary, it is a canon of statutory construction designed to preserve the constitutionality of broad congressional delegations of authority. *See infra* note 56. All this doctrine says is that the agency must articulate, based on its authorizing legislation, the decisional principle that Congress

[51] The lower court thus adhered to the principle that courts show restraint when resolving issues implicating separation-of-powers disputes. *See Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring).

provided to guide the agency's exercise of rulemaking authority.

This is not unusual. Reviewing courts must always identify the legal standard applied by an agency in order to assess the consistency of the agency's action with the articulated statutory principle. *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998).

To be sure, there are several ways the lower court could have reached the same result: that the Agency's refusal to state a reason for its choice among alternative risk management options was "arbitrary and capricious" under the Administrative Procedure Act ("APA");[52] that the Agency did not adequately explain its action;[53] or that EPA misinterpreted the statute as providing no principle to guide its exercise of public health risk management judgment.

Whichever basis for decision one chooses, the essential principle is the same: an agency must explain what it does in light of Congress' delegation of authority. It must explain that for the benefit of the public, the courts that may have to review its actions, the Congress that must exercise oversight, and the future agency decisionmakers that must make consistent decisions. Because EPA has not in this case offered any intelligible principle to guide its exercise of public heath risk management judgment, the court properly sent this case back to EPA.

[52] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). CAA § 307(d)(9) provides for the same review.

[53] *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962).

A. EPA Improperly Claims Unfettered Authority to Exercise Public Health Risk Management Judgment.

This case involves EPA's exercise of "policy" judgment to revise existing NAAQS to provide more "margin of safety" in response to uncertain and overlapping estimates of health risk. In this situation, the CAA calls for EPA to make a decision about how to manage "public health" risk. According to the statute, EPA is to set a standard that provides a level of pollution "requisite" to protect the "public health" with an "adequate margin of safety," CAA § 109,—a standard that must "promote" both public health and welfare and the "productive capacity" of the country. CAA § 101(b).

In this case, EPA merely characterized a range of uncertain risks and selected from that range without identifying any statutory principle that was guiding this selection. That the lower court demanded that EPA identify some legal standard restricting its exercise of discretion is not unusual. Courts commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[54] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts properly have questioned that construction under the nondelegation doctrine.[55] Remanding the case for EPA to construe the Act

[54] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead.

[55] *See, e.g., National Cable Television Ass'n v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310,

to provide an intelligible principle that would constrain how it manages public health risk is in full keeping with the Court's decisions.[56] This Court always has demanded that agencies be guided by an intelligible principle.[57]

EPA suggests that it *has* interpreted the statute to recognize limits on its standard revision authority. According to EPA, it considered the types of health evidence, the severity of harm, the uncertainty of risk, and the size of the sensitive population to define a range of risks. Considering these factors, EPA explains, led it to select a standard greater than zero risk but more stringent than the existing ambient standards. EPA Br. 31-33.

1313 (D.C. Cir. 1991); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 392 (1999).

[56] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] narrowly to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[57] *See, e.g., Loving v. United States*, 517 U.S. 748, 758, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976).

EPA's factors, however, *characterize* risk but say nothing about *managing* it.[58] And that is the problem with EPA's rulemaking—EPA identifies no principle to guide its exercise of public health risk *management* judgment.[59]

Risk management judgment involves the selection and justification of a regulatory option. No matter how extensive the Agency's data base for risk predictions, or how elaborate the Agency's risk characterization, characterizing risks is not the same as explaining what risk in the range presented by the Agency is "requisite" to protect "public health" with an "adequate margin of safety." EPA's failure to articulate how it managed the risk presented by these pollutants in light of these statutory standards and the purposes section of the Act contravenes precisely what Congress directed EPA to do in these rulemakings.[60]

For ozone, for example, EPA explains that estimated health risks and exposures decreased with more restrictive

---

[58] *Cf.* Committee on the Institutional Means for Assessment of Risks to Public Health, National Research Council, *Risk Assessment in the Federal Government: Managing the Process* 28-33 (1983) (identifying the components of risk assessment).

[59] *See, e.g., Industrial Union Dep't*, 448 U.S. at 645-46 (public health regulation must be based on significant public health risks).

[60] In attempting to articulate a more precise standard, EPA added in its rehearing papers that its guiding principle was to set a level "*necessary* for public health protection: neither *more* nor *less* stringent than necessary, but 'requisite.'" 195 F.3d 6, Pet. App. 72a (emphasis in original). Now, EPA asserts that it need not supply a principle that establishes a NAAQS at the "right" level. EPA Br. 27. EPA counsels' evolving view of what the *statute* requires highlights the very inadequacies that troubled the lower court. *See Burlington Truck*, 371 U.S. at 168-69. In any event, post hoc rationalizations of counsel cannot save an agency's inadequate explanation of its action. *Id.*

standards. EPA then argues that there were "important and meaningful" differences in the character of scientific evidence regarding risk for various standards. EPA Br. 33. But EPA's science advisers concluded that none of the standards under consideration, including the current standard, could be distinguished as being significantly more protective of public health.[61] Against this background, the Administrator's assertion that public health impacts were "important and sufficiently large to warrant a standard set at a level of 0.08 ppm," 62 Fed. Reg. 38868, OJA 13, simply reflects unexplained "policy" judgment. As the lower court observed, this is a "self-sufficient justification for every refusal to define limits." 175 F.3d 1037, Pet. App. 12a-13a.

Similarly, for PM, the Administrator observed that while "inherent scientific uncertainties are too great to support [$PM_{2.5}$] standards based on the lowest concentrations measured," revised standards more stringent than the existing standards were appropriate "despite [the] well recognized uncertainties."[62] As the lower court observed, the "increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much." 175 F.3d 1036, Pet. App. 10a.

Ultimately, according to the Administrator, she is authorized by the Act to revise NAAQS based on a "policy judgment" to provide more margin of safety, even if health impacts "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric." 62 Fed. Reg. 38688, PMJA 38; *id.* 38883, OJA 28. It is this assertion of unfettered authority to exercise discretion to which the lower

---

[61] *See supra* p. 8.

[62] 62 Fed. Reg. 38675, PMJA 25; *see supra* pp. 10-14.

court objected. 175 F.3d 1035, Pet. App. 8a (EPA's revision decision is "nothing more than a statement that lower exposure levels are associated with lower risk to public health.").

By offering as its decisional criteria factors that go *only to risk characterization*, and *not* public heath *risk management*, EPA would turn the Clean Air Act into a statute like the National Environmental Policy Act ("NEPA"), for which judicial review looks only at the procedure the agency followed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (*citing Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). If the Agency has followed an elaborate procedure and identified the range of potential health risks, EPA argues, judicial review should cease. There is to be, in effect, no review of its *substantive* decisionmaking at all.

This argument may work for a statute that, like NEPA, requires only "procedure" and not a "substantive" decisionmaking result. It does not work for a statute that, like § 109, demands a substantive outcome: a level of air quality "requisite to protect" the "public health" with an "adequate margin of safety."

EPA in fact comes close to arguing its § 109 decisionmaking is a matter "committed to agency discretion by law" and therefore unreviewable. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). But that cannot be so because, as even EPA concedes, the Clean Air Act unquestionably provides law to apply. EPA Br. 22.

In short, the problem here is that EPA has interpreted the statute to provide no principle to guide its exercise of risk management judgment—a problem so fundamental that, *if* Congress had written the Act as interpreted by EPA, the constitutionality of the statute would have been called into

question. It is for this reason that the court below invoked the nondelegation doctrine.

Since the creation of the Interstate Commerce Commission, this country has engaged in the process of turning over government decisions to specialized agencies. Concomitant with the delegation of decisionmaking authority is a requirement that the decisionmakers remain accountable, and that Congress remains accountable. This means that agency decisionmakers must explain their rationale in light of Congress' delegation of authority.

Agencies must explain the statutory standard that guides their exercise of rulemaking discretion and how consideration of relevant science is applied in reference to that standard. This explanation is important for multiple reasons implicated by the nondelegation doctrine, as the lower court explained. 175 F.3d 1038, Pet. App. 14a. First, an explanation is necessary so that the courts can exercise judicial review.[63] There must be ascertainable standards to which a reviewing court may turn, for "it will not do for a court to be compelled to guess at the theory underlying the agency's action . . . ." *Chenery*, 332 U.S. at 196-97.

Second, an explanation is necessary so that Congress can exercise its own oversight of the agency. For there to be informed legislative oversight, Congress must be able to understand how the agency has interpreted the delegation it

---

[63] *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring); *see also* L. Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1440 (April 2000).

has been given.[64] Third, an explanation of the principle underlying a decision is necessary so that agency decisionmakers themselves can, in the future, be consistent. *State Farm*, 463 U.S. at 46-49, 56-57. Fourth, the public has a right to be told what Congress has delegated to the Executive Branch, and whether the Executive Branch has acted within its congressionally delegated powers. *Clinton v. New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J, concurring).

The requirement that an agency explain the statutory principle that guides its exercise of judgment should be enforced all the more strictly in a case like this one, where the decision being made is of enormous importance in terms of its broad impacts on society. *Cf. Industrial Union Dep't,* 448 U.S. at 686. As the D.C. Circuit stated in remanding a different NAAQS, "[w]here, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning."[65] As the court explained, "[u]nless [the Administrator] describes *the standard under which she has arrived at this conclusion,* supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" *American Lung*, 134 F.3d at 392-93 (emphasis added; citation omitted).

---

[64] *See* W. Wilson, *Congressional Government* 303 (1885), *cited in Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979); *see also Loving*, 517 U.S. at 773.

[65] *American Lung Ass'n*, 134 F.3d at 392; *see also FDA v. Brown & Williamson Tobacco Corp.*, 120 S Ct. 1291, 1301 (2000).

If agencies need not explain their decisions in light of the legal standard imposed by Congress, we will be left with a government of men, not of laws. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Guarding against this result are the checks provided by the coordinate branches—especially judicial review—and, more fundamentally, an insistence on written rules applied as objectively as possible—insistence, in short, on the rule of law. *See United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring).

By contrast, the EPA's position in this case furthers the pernicious idea that some decisions are beyond the understanding both of the public and the courts—that some decisions, indeed the most important ones, must ultimately turn on unquantifiable, inexplicable policy "judgment" by the Executive. Reliance on unexplained agency judgment leads to rulemaking by ideology, prejudice, or messianic urge. This is not the "rule of law."

In sum, the agency must first explain the statutory principle it has applied based on Congress' delegation of authority, and the courts must then say what the law is ultimately. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). That is all the D.C. Circuit has asked EPA to do in this case—a most unremarkable outcome when measured against EPA's remarkable claim of unfettered authority to exercise public health risk management judgment.

B. EPA Is Obligated To Identify the Principle that Guides Its Exercise of Rulemaking Authority Even Where Congress Acts By Broad Delegation.

In large part, the Government's argument for waving EPA through the judicial review gate is that the courts have affirmed the constitutionality of other, broad delegations. EPA Br. 26-30; Mass/NJ Br. 39-41. In those cases, however,

parties did not seek review of whether "the will of Congress [had] been obeyed" by the agency, *see Yakus v. United States*, 321 U.S, 414, 426 (1944), but rather whether the statute was drafted so as to make that inquiry impossible (i.e., whether the statute itself created a nondelegation problem).

In those cases, the Court found an ample basis for the agency to articulate, by resort to the statutory language, legislative history, and other indicia of congressional intent, defining principles for making its judgment. As a result, the cases on which EPA relies do not stand for the proposition that an agency may implement delegated authority without articulating an "intelligible principle."

For example, in *Touby*, the Court rejected a challenge to Congress' delegation of power to the Attorney General to add drugs temporarily to the schedule of controlled substances when "necessary to avoid an imminent hazard to the public safety." 500 U.S. at 166. As the Court found, the statute articulated clear boundaries for the Attorney General's discretion, *id* at 167, and the question whether the Attorney General had obeyed this legislative command was not before the Court. By contrast, the question before the court of appeals in this case was whether the delegated agency had acted in accordance with a defined principle grounded in the statutory language and purpose.[66]

That the Court has found in other cases that there were sufficient limits on the agency's discretion to satisfy facial challenges to the constitutionality of a statute does not suggest that an agency need not identify those limits when

[66] *See also Skinner*, 490 U.S. 212 (challenge to the constitutionality of a statute directing the Secretary of Transportation to establish user fees to cover costs of pipeline safety program, *not* to consistency of the resulting regulatory program with the statute).

exercising its discretion.[67] If anything, the Court's careful analysis of the congressional delegation in these cases confirms the need for agency action to be guided by an intelligible principle founded in the language and purposes of the Act.[68]

As the Court has observed, the touchstone of the non-delegation doctrine remains that "private rights are protected by access to the courts *to test the application of the policy* in light of the[] legislative declaration[]." *American Power & Light*, 329 U.S. at 105 (emphasis added). All the lower court's decision says is that EPA cannot construe Congress' broad delegation of NAAQS revision authority to authorize unfettered risk management judgment. Rather, the Agency must explain the statutory principle that constrains its exercise of discretion.

C. There Is Law To Apply To Guide EPA's Exercise of Risk Management Judgment.

Where an agency, as here, has interpreted a statute to provide *no* principle to guide its exercise of discretion, the court must look to the statute and congressional intent to ascertain whether there is law to apply. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Thus, in every challenge to a statute under the nondelegation doctrine, this Court has analyzed the statute and congressional intent to ascertain whether Congress has identified legal standards for

[67] *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

[68] *See also FPC v. Conway*, 426 U.S. 271 (1976) (Commission must use statutory "undue discrimination" principle when selecting a standard from the "zone of reasonableness").

the agency to use in deriving an intelligible principle for its exercise of discretion.[69]

Rather than simply remanding the case to EPA to determine whether there is law to apply that would save the constitutionality of the statute, therefore, this Court, in the exercise of its Article III function, must itself resolve whether the CAA provides guidance for the development of an "intelligible principle." To find the law, this Court should ask, as a first step, whether Congress has unambiguously stated its intention. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 & n.9 (1984). Congress has done so.

As explained by APC and ATA in Case No. 99-1426, Congress intended that EPA exercise its public health risk management judgment based on consideration of the overall impact of its decision on society. EPA cannot merely characterize risks to individual health that might be caused by breathing a pollutant and then, without explanation, choose a risk level that EPA declares is "sufficiently large" to justify a revised NAAQS. *See supra* pp. 26-27. Instead, EPA must explain why the regulatory option chosen satisfies the decisional criteria in § 109, why it promotes the statutory purposes in § 101, and why it was selected and other options rejected. APC Br. 27-45.

Once the Court determines that there is law to apply under a *Chevron* Step 1 analysis, thereby defining the scope of EPA's discretion under § 109, EPA can then exercise its discretion under the Act in a manner consistent with *Chevron* Step 2, and in a manner that is not arbitrary and that reflects reasoned decisionmaking. The Agency is not required, as EPA argues, to develop a precise metric for the exercise of

---

[69] *See, e.g., Touby,* 500 U.S. at 166; *Mistretta* 488 U.S. at 374-77.

risk management judgment. *See* EPA Br. 26. Rather, as the lower court observed, what is required is "reasonable coherence" based on application of the statutory language and purposes. 175 F.3d 1039-40, Pet. App. 17a-18a.

In this case, EPA's failure to explain itself runs afoul of *Chevron* in the same way the FCC did in *AT&T Corp.* There the Court struck down the FCC's interpretation of a statute as unreasonable because the FCC had failed to supply any "limiting standard, rationally related to the goals of the Act." 525 U.S. at 388; *see also* Bressman, *supra* note 63, at 1434.

Here the nondelegation doctrine and *Chevron* converge to a crystalline point: that the agency must explain the "limiting standard" that guided its exercise of public health risk management judgment. Only if this Court finds that the normal meaning of "public health," the language of §§ 108 and 109, and the statutory purposes of the Act provide *no* guidance for the Agency's exercise of public health risk management judgment would there be a *statutory* nondelegation problem—one that could not be overcome by the Agency by interpreting the Act under *Chevron* Step 2.

II. EPA'S REVISION TO THE OZONE NAAQS, TOGETHER WITH ITS REVOCATION OF THE EXISTING STANDARD, IS REVIEWABLE FINAL AGENCY ACTION.

In Subpart 2 of Part D of Title I of the Act, Congress enacted a comprehensive program for reducing ozone following decades of unrealistic deadlines and control measures that proved inadequate to the task. The court below held that Subpart 2 "must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS." 175 F.3d 1049, Pet. App. 40a. As the court observed, if EPA could adopt and implement a more

stringent ozone standard under a more expeditious schedule, this comprehensive Subpart 2 "risk management" program adopted by Congress "would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *Id.* 1050, Pet. App. 42a.

Even though Subpart 2 precludes EPA from requiring areas to comply "more quickly or with a more stringent ozone NAAQS," the court refused to set aside the standard on this basis because, in its view, the "appropriateness" language of § 109(d) does not allow EPA to reject a standard revision based on "implementation" factors. Nevertheless, in remanding the ozone NAAQS on nondelegation grounds, the court made clear that the ozone "standard is [un]likely to engender costly compliance activities *in light of our determination that it can be enforced only in conformity with Subpart 2.*" 195 F.3d 10, Pet. App. 81a (emphasis added).

For the reasons discussed below, the court of appeals had jurisdiction to resolve petitioners' challenges based on Subpart 2. While the court properly held that Subpart 2 is the exclusive congressional risk management program for addressing ozone health risks (and thereby restricts EPA's authority to implement or to enforce a more stringent ozone NAAQS), it was wrong when it held that the primary and the identical secondary 8-hour standard could be adopted and remain in effect during the remand proceeding.

A. EPA's Determination of Its Authority To Revise the Ozone NAAQS Is Final Action.

EPA argues that the lower court's decision concerning the interplay between Subpart 2 and the revised NAAQS was "premature[]," an argument EPA first detailed in its rehearing petition. EPA Br. 35. The court rejected this argument, because EPA "reached a final decision regarding its power to

implement its revised ozone standard." 195 F.3d 9, Pet. App. 78a.

Section 181(a) of Subpart 2 explains how Congress intended areas to be classified as nonattainment "for ozone," for purposes of imposing statutorily-mandated compliance deadlines and attainment measures. Section 181(b) explains how areas designated as in attainment for ozone are to be redesignated to nonattainment if their ozone air quality deteriorates in the future. In these provisions, Congress provided that all of the Act's requirements and timetables "for ozone" are to be implemented to attain and maintain the ozone NAAQS that existed in 1990. This is confirmed by other Subpart 2 provisions, as discussed in Part III below.

In the rulemaking at issue here, EPA promulgated a rule that simultaneously established a more stringent 8-hour ozone NAAQS and made the 1-hour ozone NAAQS and related Subpart 2 program automatically inapplicable to an area once EPA determines that its air quality meets the 1-hour NAAQS. 40 C.F.R. §§ 50.9(b) & 50.10. Industry and States petitioned the D.C. Circuit to review EPA's rule as facially inconsistent with the ozone risk management plan codified by Congress in Subpart 2—asking the court to resolve "[w]hether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different [more stringent] NAAQS."[70]

EPA recognizes in its brief that it would be "impossible" to implement the more stringent 8-hour NAAQS that EPA

---

[70] Non-State CAA Pet'rs & Intervenors' Br. (D.C. Cir. No. 97-1441) 2, 29; *see also* APC Resp. to Pet. for Cert. (99-1257) 22.

adopted in a manner that was consistent with Congress' ozone attainment program in Subpart 2. EPA Br. 47; *see also* Mass/NJ Br 47-48 (applying Subpart 2 to that standard would be "bizarre"). Precisely for this reason, and because EPA's 8-hour NAAQS addressed no new health effects associated with ozone, those seeking review of EPA's revised ozone NAAQS argued that Subpart 2 "codified" the 1-hour NAAQS and that a more stringent, revised ozone NAAQS therefore was not "appropriate" under § 109(d). Non-State CAA Pet'rs and Intervenors' Br. (D.C. Cir. 97-1441) 33.

By rejecting these arguments, EPA's final rule resolved the interplay of Subpart 2 and EPA's authority to establish a more stringent ozone NAAQS. This is a final Agency action, and review of that action had to be sought within 60 days of its publication in the *Federal Register*. CAA § 307(b)(1); *see also Harrison*, 446 U.S. at 587-94.

EPA now argues that petitioners below really challenged not a rule, but "preamble statements" that are not "final agency action." *See supra* p. 18. EPA is wrong. *EPA's promulgation of its more stringent 8-hour standard presents facial inconsistencies* with the Subpart 2 risk management program. Consequently, that action's validity *vel non* can be resolved only by resolving whether Subpart 2 restricts EPA's authority to adopt and to implement a more stringent revised ozone NAAQS. The court's review of EPA's statements in the final rule preamble is entirely appropriate to permit the court to understand that rule's nature, purpose, and basis. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 158 (1982).[71]

---

[71] *See also HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) ("preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules") (quoting *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)).

Moreover, the preamble statements signed by the Administrator[72] are authoritative explanations of EPA's position on its authority to implement its more stringent 8-hour ozone NAAQS under Subpart 1. That position, which in any event is embodied in the rule's text, 40 C.F.R. § 50.9(b), will "alter the legal regime" to which EPA, States, and regulated parties are subject. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (reviewing Fish & Wildlife Service's Biological Opinion as final action under Endangered Species Act). Such preamble statements are themselves reviewable,[73] and review is particularly warranted here, where § 307(b) directs review of *any* final Administrator action. *Harrison*, 446 U.S. at 589.

Finally, in a separate but related case, EPA has acknowledged that its decision regarding the relationship between the revised ozone NAAQS and Subpart 2 was reviewable below as final action in the present case. In *EDF v. Browner*, D.C. Cir. 98-1363, EPA argued the court lacked subject matter jurisdiction in that case to hear EDF's challenge to EPA's determination that the 1-hour NAAQS and Subpart 2 were inapplicable in specific areas that had met the 1-hour NAAQS. EPA Br. (D.C. Cir. 98-1363) 27-28, App. 22a-23a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of

---

[72] *See supra* p. 18; *see also* 62 Fed. Reg. 38424, PMJA 198 (memorandum from President Clinton).

[73] Indeed, EPA recently argued to the D.C. Circuit that a preamble statement *itself* may be reviewable action. *See Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000).

EPA's interpretation and challenged aspects of it in the pending *ATA* litigation"—the case before this Court. *Id.* 29, App. 23a.

In sum, EPA's promulgation of a new standard to replace the 1-hour standard and the statutory Subpart 2 ozone attainment program was final agency action that was reviewable under § 307(b) of the Clean Air Act.

B. EPA's Decision To Replace Subpart 2 Is Ripe.

As discussed above, whether the Act precludes EPA from replacing the 1-hour ozone NAAQS with a new, more stringent NAAQS that cannot be implemented under Subpart 2 is a pure question of law that requires no further factual development. *See also* 195 F.3d 8-9; Pet. App. 77a-79a.

As this Court has recognized, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[74] In § 307(b) of the Act, Congress authorized courts of appeals to review *any final EPA action* under the Act. CAA § 307(b); *Harrison*, 446 U.S. at 589. The sweeping nature of Congress' directive that judicial review of "any" final CAA actions occur immediately is clear on the statute's face, *id.* at 588, and the legislative history confirms Congress' purpose. *Id.* at 589-90. Quick resolution of the validity of EPA actions is crucial, *inter alia*, to maintain "the integrity of the time sequences provided through the Act." *See* S. Rep. No. 91-1196, at 41 (1970), *reprinted in* 1 Sen. Comm. on Pub. Works, *A Legislative History of the Clean Air Amendments of 1970*, at 441 (Comm. Print 1974).

[74] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also Harrison*, 446 U.S. at 593. There is no constitutional barrier to giving effect to Congress' judicial review directive in § 307(b). Because the petitions for review raised a purely legal issue, i.e., whether Subpart 2 provides EPA's sole authority to enforce ozone NAAQS, the court was fully able to review that issue.

As a result, the justiciability concerns underlying *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), are absent here. That is, *Abbott Labs*' two-pronged ripeness test embodies the prudential doctrine that "courts, through avoidance of premature adjudication, [should refrain] from entangling themselves in abstract disagreements over administrative policies, and also [is intended] to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way . . . ." *Id.* at 148. As seen above, however, Congress in the CAA specifically instructed courts to review final actions "pre-enforcement" in order to ensure early resolution of challenges to EPA's execution of the CAA. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (action was "unlike agency rules that Congress has specifically instructed the courts to review 'pre-enforcement'") (*citing Harrison*, 446 U.S. at 592-93; CAA § 307(b)).[75]

Because Congress directed that all final EPA actions under the CAA be subject to immediate review, and because the issue presented requires no further development, the lower court did not err in reviewing the action here.[76]

[75] For the same reason, EPA's reliance on *Lujan v. National Wildlife Fed'n*, *see* EPA Br. 36, is misplaced. *See* 497 U.S. 871, 891 (1990) (noting that challenges may be brought under certain "statutes [that] permit . . . judicial review, directly, *even before the concrete effects normally required for APA review are felt*") (emphasis added).

[76] Even if the Court deems the issue presented for review to the lower court subject to *Abbott Labs*, this Court should find the issue ripe. As explained above, the question of EPA's legal authority under Subparts 1 and 2 is "purely legal," and hardship from delayed review would ensue from the disruption to State and industry planning and control efforts.

III. SUBPART 2 RESTRICTS EPA'S AUTHORITY TO REVISE THE OZONE NAAQS.

EPA claims "[t]he only issue involving 'implementation' before the court of appeals . . . was whether the participants were correct that the Section 181(a) scheme precluded EPA from promulgating the revised standard." EPA Br. 35.[77] Addressing this issue, however, requires an understanding of Subpart 2 and how it restricts EPA's authority with respect to a more stringent revised NAAQS for ozone. The facial incompatibility between Subpart 2 and EPA's establishment of the more stringent 8-hour ozone NAAQS shows that EPA lacked authority to implement or enforce a more stringent NAAQS, and indeed lacked authority to replace the 1-hour ozone NAAQS as the template for Congress' detailed statutory "risk management" program.

A. Subpart 2's Plain Language Precludes EPA From Replacing the Existing Ozone NAAQS.

Section 107(d) contains the requirements for designations and redesignations of areas as attainment, nonattainment, or unclassifiable for any criteria pollutant. Section 107(d)(4) requires States and EPA to designate areas for ozone within 240 days after enactment of the 1990 CAA Amendments. Under § 107(d)(3), areas may later be "redesignated." And

---

See State Resp. Br. (99-1257) § III.B.3. Moreover, in fashioning a remedy, 195 F.3d 10, Pet. App. 81a-82a, it was appropriate for the court to review EPA's implementation authority under Subpart 2. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).

[77] This was not the only implementation issue raised by Industry petitioners, as intervenors supporting EPA below recognize. *See* Mass/NJ Pet. for Cert. (99-1263) 14, 22.

§ 107(d)(1) addresses area designations under a new or revised NAAQS.

Subpart 2 requires that "[e]ach area designated nonattainment for ozone *pursuant to section 107(d)* of this Act"—not any specific paragraph of § 107(d), but *any* part of § 107(d)—be classified "by operation of law" under Subpart 2 and then regulated pursuant to Subpart 2's timetables and control measures. CAA § 181(a)(1) (emphasis added). Congress also directed in § 181 that "*[a]ny area* that is designated attainment or unclassifiable *for ozone* under section 107(d)(4) of this Act, *and that is subsequently redesignated to nonattainment for ozone* under section 107(d)(3) of this Act, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of Section 181." CAA § 181(b)(1) (emphasis added).

Thus, Subpart 2 by its plain terms governs management of ozone indefinitely, until Congress changes the statutory scheme. The Subpart 2 deadlines have *not* all run; indeed, as the second sentence of § 181(b)(1) makes clear, they will be reset and run anew *any time* an area initially designated under § 107(d)(4) becomes nonattainment "for ozone."

Moreover, as the lower court recognized, Congress provided in § 172(a)(1)(C) that EPA's generic authority under Subpart 1 to classify areas for purposes of applying an attainment date "shall not apply with respect to nonattainment areas for which classifications [and attainment dates] are specifically provided under other provisions of [Part D]." 175 F.3d 1048, Pet App. 37a. Likewise, Congress provided in § 172(a)(2)(D) that Subpart 1's attainment dates "shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other

provisions of [Part D]." As noted above, Subpart 2 specifically provides classifications and attainment dates for "[e]ach area designated nonattainment *for ozone* pursuant to section 107(d)" (emphasis added).

Contrary to claims by Massachusetts, New Jersey and ALA, therefore, Congress made clear in § 172(a) that EPA's Subpart 1 authority to classify and to regulate nonattainment areas is expressly limited, because Congress has "specifically provided" a scheme for classification and attainment deadlines under Subpart 2. EPA argues, however, that because Subpart 2 addresses the 1-hour ozone NAAQS, Subpart 2 does not "specifically provide[]" an alternative to Subpart 1 for an ozone NAAQS designed to replace the 1-hour ozone NAAQS. *Id.* This argument is entirely circular.

As the lower court found, EPA's position ignores the plain language of § 181(a), which makes Subpart 2 broadly applicable to "[e]ach area designated nonattainment *for ozone* pursuant to section 107(d)" (emphasis added). EPA's argument also ignores § 181(b), which makes Subpart 2 applicable to *any* area that is "subsequently redesignated to nonattainment *for ozone*" (emphasis added). The lower court correctly found under "Step 1" of *Chevron* that the statute on its face disposes of EPA's arguments by establishing a comprehensive and long range risk management program for ozone. 175 F.3d 1048, Pet. App. 38a-39a.

EPA nevertheless argues that the court of appeals erred by not interpreting the plain language of CAA § 181(a) (which refers to "[e]ach area designated nonattainment for ozone pursuant to section 107(d)") to refer only to those areas designated under § 107(d)(4). The court below found, however, that "Congress intentionally referred to § 107(d) as a whole," 175 F.3d 1049, Pet. App. 39a, making Subpart 2 applicable to *all areas* that are "designated nonattainment for

ozone pursuant to section 107(d)." CAA § 181(a). As the court concluded, "the reference to § 107(d) in § 181(a)(1) appears to have been purposeful and not the drafting error EPA's interpretation implies." 175 F3d 1048, Pet. App. 39a.

The legislative history confirms that Congress rejected a limited scope for the Subpart 2 risk management scheme. The Senate's version of Subpart 2 classified only initial designations.[78] Moreover, this Senate Bill did not require using "design values" based on the 1-hour NAAQS, as did § 181(a) as enacted, but tied classification to the degree the area was in nonattainment with the ozone NAAQS. *Id.*

Similarly, the Bill referred to the House Energy and Commerce Committee would have made the Subpart 2 scheme applicable only to designations under § 107(d)(4)'s predecessor.[79] Subsequently, that Committee replaced that specific reference to § 107(d)(4) with the general reference to all nonattainment designations "for ozone pursuant to section 107(d)."[80] The Conference Committee then reported the text of the revised House Bill in lieu of the Senate's,[81] and the conferees' version was enacted. This change in legislative language that reflects a congressional intent to adopt a comprehensive and exclusive risk management program for ozone must be given effect. *Cf. Russello v. United States*, 464 U.S. 16, 23-34 (1983).

---

[78] *See* S. 1630, 101st Cong., §§ 101, 107, *reprinted in* 3 *1990 Legis. Hist.*, *supra* note 3, at 4124-25, 4195.

[79] *See* H.R. 3030, 101st Cong., §§ 101(a), 103, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3748-49, 3795-96.

[80] H.R. Rep. No. 101-490, pt. 1, at 3-6, 17, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3027-30, 3041.

[81] *See* H.R. Rep. No. 101-952, at 27-28, *reprinted in* 1 *1990 Legis. Hist.*, *supra* note 3, at 1477-78.

In a final effort to find some supportive language in the statute, EPA notes § 181(a)'s subheading: "Classification and attainment dates for 1989 nonattainment areas." But "[t]he title of a statute . . . cannot limit the plain meaning of the text. For interpretative purposes, [statutory headings are] of use *only when* [they] shed light on some ambiguous word or phrase." *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (emphasis added). In any event, this subheading does not contradict § 181(a)'s plain meaning, EPA Br. 47; it reflects Congress' intent that it is the existing 1-hour ozone NAAQS that EPA is supposed to administer, *not a revised, more stringent one "for ozone."* *Cf.* § 181(b).

Furthermore, contrary to Massachusetts and New Jersey's suggestion, Subpart 2's plain language does *not* make superfluous Congress' grant to EPA of authority to review and revise the NAAQS and to designate and to classify nonattainment areas under Subpart 1. Mass/NJ Br. 47. EPA's review of the ozone NAAQS, for example, would inform Congress of the adequacy of the statutory ozone program as "appropriate." Moreover, even under the court of appeals' decision, § 109(d) and Subpart 1 still apply to *other* criteria pollutants for which Congress has not provided a comprehensive risk management program based on a specific NAAQS. For example, in Subpart 4 of Part D, Congress enacted an exclusive risk management program for the attainment of PM_{10}, CAA §§ 188-190,[82] but no such program for $PM_{2.5}$. Likewise in Subpart 5, Congress provided no program comparable to Subpart 2 for any of three other criteria pollutants: sulfur oxides, nitrogen dioxide, and lead. *See* CAA § 191. Thus, Subpart 1 applies to a revised

[82] *See also* CAA §§ 186-187 (establishing carbon monoxide program).

NAAQS for these criteria pollutants, and to NAAQS for any new criteria pollutants EPA may list. By contrast, allowing EPA to replace the ozone NAAQS makes Subpart 2 superfluous. As a result, this interpretation must be rejected. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).

B. Subpart 2's History and Structure Confirm It Is the Exclusive Plan for Managing Ozone.

EPA's revision of the ozone NAAQS also ignores Congress' description of Subpart 2 as the comprehensive risk management program for ozone. As the House noted when it modified its version of Subpart 2 to cover all ozone designations, "[i]n 1977, Congress tried to waive [*sic*] a 'magic wand' and command that all [ozone] nonattainment areas will meet the applicable [NAAQS]. . . by . . . December 31, 1987 . . . [That] date [has] come and gone and it is clear that . . . we had no 'magic' solutions."[83] As a result, Congress enacted Subpart 2 to "address the failure of our nonattainment areas to achieve ambient air quality deadlines in existing law . . . . We have not [in Subpart 2], however, simply continued to tell the states to do a [Subpart 1] plan to clean their air. That did not work."[84]

Congress, in 1990, thus concluded that legislating *how to attain* the ozone standard was as important, from a public

[83] H.R. Rep. No. 101-490, pt. 1, at 146-47, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3170-71, OJA 3557-58.

[84] 136 Cong. Rec. H12867 (daily ed. Oct. 26, 1990) (Rep. Fields), *reprinted in* 1 *1990 Legis. Hist.*, *supra* note 3, at 1236, OJA 3543; *see also* 136 Cong. Rec. 132, *reprinted in* 4 *1990 Legis. Hist.*, *supra* note 3, at 4837 (Sen. Chafee).

health standpoint, as setting the standard itself.[85] According to the House Committee, a long-term strategy that mandated control measures and sanctions for failure to achieve required ozone reductions was necessary.

This is precisely what Subpart 2 accomplishes. Subpart 2, uniquely, reflects Congress' response to risk management, not by imposing deadlines and general requirements that must be developed by states and then seeing these deadlines and general requirements fail to achieve the desired ozone reductions, but by adopting a comprehensive risk management program that Congress concluded embodies sound public health policy with respect to reducing ambient ozone concentrations.

Subpart 2 provides a detailed timetable for attaining the ozone NAAQS, both in areas currently in nonattainment and areas becoming nonattainment in the future. CAA § 181(a), (b).[86] It provides a manner for reducing ozone levels depending on the severity of the pollution. *See, e.g.*, § 182(a)-(e). It provides a legislative check on EPA's use of a methodology for determining ozone air quality. § 183(g). It provides interstate ozone pollution requirements. § 184; *see also supra* pp. 4-5.

---

[85] *See* H.R. Rep. No. 101-490, pt. 1, at 145-49, *reprinted in* 2 *1990 Legis. Hist.*, *supra* note 3, at 3169-73 (discussing the failure to attain reductions of ozone under Subpart 1), OJA 3556-60.

[86] Although ALA points to EPA's treatment of some nonattainment areas as "submarginal," ALA Br. 39-40, as evidence that Subpart 2 does not apply comprehensively to all nonattainment areas, EPA has indicated that submarginal areas are "subject to the time schedule of subpart 2" if their air quality calls for reclassification under Table 1. 57 Fed. Reg. 13525. Thus, Subpart 2 is a comprehensive response to the ozone nonattainment problem.

The only reasonable interpretation of this comprehensive and long term risk management program is that Congress meant for Subpart 2 to be the *exclusive* federal statutory program for lowering ambient ozone levels. EPA's establishment of its 8-hour ozone NAAQS renders irrelevant this carefully crafted legislation. Given Congress' detailed legislation, it is not plausible to conclude EPA retained authority to adopt a NAAQS inconsistent with this program. *Cf. Brown & Williamson*, 120 S.Ct. at 1301 (legislation regulating sale of tobacco confirmed Congress' intent to restrict FDA authority to regulate tobacco as "drug").

C. Subpart 2 Renders the Revised Ozone NAAQS Unlawful.

Section 109(d) authorizes EPA to revise a NAAQS only as "appropriate" in accordance with CAA §§ 108 and 109(b). As discussed above, the court of appeals was correct that a revised, more stringent NAAQS could not be implemented or enforced except in conformity with Subpart 2. But if a more stringent revised NAAQS cannot be enforced except in conformity with Subpart 2, and as EPA explains, only the 1-hour NAAQS can be implemented and enforced under Subpart 2, it is not "appropriate" to revise that NAAQS under § 109(d) to establish a more stringent NAAQS for ozone. Because Subpart 2 is Congress' comprehensive and long term program for managing ozone, and because this program applies to "ozone nonattainment areas" generally,[87] this

---

[87] Section 181(a) addresses "primary standard[s]" only in specifying outer dates for attainment of the 1-hour NAAQS. Subpart 2 otherwise simply addresses "area[s] designated nonattainment for ozone."

conclusion applies with equal force to primary and secondary ozone NAAQS.[88]

This Court therefore should affirm the lower court's holding that Subpart 2 restricts EPA's authority to enforce a more stringent ozone NAAQS, should reject that court's holding that EPA may promulgate a standard that is contrary to § 109(d) and Subpart 2, and should vacate the revised ozone NAAQS as inconsistent with the congressional program for achieving ozone reductions.

CONCLUSION

For these reasons, the Court should order vacatur of the revised NAAQS for ozone and $PM_{2.5}$.

Respectfully submitted,

DAVID E. MENOTTI
WILLIAM F. PEDERSEN
JEFFREY A. KNIGHT
SHAWPITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8675
Counsel for American Forest & Paper Association, American Iron & Steel Institute, and Alliance of Automobile Manufacturers

HENRY V. NICKEL
F. WILLIAM BROWNELL
(Counsel of Record)
JAMES N. CHRISTMAN
LUCINDA M. LANGWORTHY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500
Counsel for Appalachian Power Co., et al., American Public Power Association, and National Association of Home Builders

G. WILLIAM FRICK
M. ELIZABETH COX
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8250
Counsel for American Petroleum Institute

DAVID F. ZOLL
ALEXANDRA DAPOLITO DUNN
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5165
Counsel for American Chemistry Council

MAURICE H. MCBRIDE
NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION
1899 L Street, N.W.
Washington, D.C. 20036
(202) 457-0480
Counsel for National Petrochemical & Refiners Association

JULIE BECKER
ALLIANCE OF AUTOMOBILE MANUFACTURERS
1401 H STREET, N.W.
Suite 900
Washington, D.C. 20005
(202) 326 5500
Counsel for Alliance of Automobile Manufacturers

NEWMAN R. PORTER
LEWIS AND ROCA
40 N. Central Avenue
Phoenix, AZ 85004
(602) 262-5786
Counsel for Nevada Mining Association, Newmont Gold Company, and Meridian Gold Company

HAROLD P. QUINN, JR.
NATIONAL MINING ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652
Counsel for National Mining Association

---

[88] In any event, the court of appeals was correct to remand the secondary NAAQS due to the extent EPA relied on the primary NAAQS in promulgating it. 175 F.3d 1040; Pet. App. 18a.

KURT E. BLASE
O'CONNOR & HANNAN
Suite 500
1666 K Street, N.W.
Washington, D.C. 20006-2803
(202) 887-1400
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, Kennecott Services Company, and National Stone Association

RUSSELL S. FRYE
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8878
and
RICHARD WASSERSTROM
AMERICAN FOREST & PAPER ASSOCIATION, INC.
1111 19th Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 463-2582
Counsel for American Forest & Paper Association, Inc.

MARCELLE SHOOP
Associate General Counsel
KENNECOTT UTAH COPPER CORPORATION
8315 West 3595 South
P.O. Box 6001
Magna, Utah 84044-6001
(801) 252-3000
Counsel for Kennecott Holdings Corporation, Kennecott Energy and Coal Company, and Kennecott Services Co.

TIMOTHY L. HARKER
THE HARKER LAW FIRM
9500 Accord Drive
Potomac, MD 20854
(301) 983-0964
and
THOMAS J. GRAVES
NATIONAL PAINT AND COATINGS ASSOCIATION, INC.
1500 Rhode Island Ave., N.W.
Washington, D.C. 20005
(202) 462-6272
Counsel for National Paint and Coatings Association

GRANT CRANDALL
General Counsel
UNITED MINE WORKERS OF AMERICA, AFL-CIO
8315 Lee Highway
Fairfax, VA 22031
(703) 208-7200
and
EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
(304) 258-1977
Counsel for United Mine Workers of America, AFL-CIO

DUANE J. DESIDERIO
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 861-2146
Counsel for National Association of Home Builders

DAVID M. FLANNERY
JACKSON & KELLY
P.O. Box 553
1600 Laidley Tower
Charleston, WV 25322
(304) 340-1017
Counsel for Midwest Ozone Group, and West Virginia Chamber of Commerce

PETER S. GLASER
SHOOK, HARDY & BACON
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 639-5627
Counsel for Western Fuels Association, Inc.

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000
Counsel for Phoenix Cement Co.

September 9, 2000

APPENDICES

APPENDICES

A. 40 C.F.R. § 50.9 National 1-hour primary and secondary ambient air quality standards for ozone (excerpt)..... 1a

B. S. 1630, 101st Cong., 2d Sess., § 107 (1990) (Additional Requirements for Ozone Nonattainment Areas) (excerpt)..... 2a

C. H.R. 3030, 101st Cong., 2d Sess., § 103 (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)..... 5a

D. H.R. Rep. No. 101-952, 101st Cong., 2d Sess., (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)..... 12a

E. Brief of Respondent United States Environmental Protection Agency, *Environmental Defense Fund v. Browner* (D.C. Cir. No. 98-1363) (excerpt) 19a

F. Appalachian Power Co., *et al.*, Petition for D.C. Circuit Review of EPA Ozone NAAQS Rulemaking 25a

APPENDIX A

40 C.F.R. § 50.9 National 1-hour primary and secondary ambient air quality standards for ozone (Excerpt)

* * *

(b) The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified 40 CFR part 81.

APPENDIX B

S.1630, 101st Cong., 2d Sess., § 107 (1990) (Additional Requirements for Ozone Nonattainment Areas) (excerpt)

ADDITIONAL REQUIREMENTS FOR OZONE NONATTAINMENT AREAS

Sec. 107. Part D of the Clean Air Act is amended by adding the following new subpart at the end thereof:

"SUBPART 2—ADDITIONAL PROVISIONS REGARDING OZONE NONATTAINMENT AREAS
"CLASSIFICATIONS OF OZONE NONATTAINMENT AREAS

"SEC. 181. (a) CLASSIFICATION BY OPERATION OF LAW.—Each area designated nonattainment for ozone under section 107(f)(3) is hereby classified by operation of law in one of the following categories based upon the percentage by which such standard is exceeded:

"Area classification	Amount by which standard exceeded
Moderate ozone nonattainment area	Not greater than 20 per centum
Serious ozone nonattainment area ...	More than 20 per centum but less than 50 per centum
Severe ozone nonattainment area	Equal to or greater than 50 per centum but not more than 120 per centum
Extreme ozone nonattainment area	More than 120 per centum

"(b) DATA AND METHODS FOR CLASSIFICATION.–For purposes of determining the

percentage by which the national primary ambient air quality standard for ozone is exceeded in any area –

"(1) the most recent monitoring data available as determined by the Administrator shall be used; and

"(2) the interpretation methodology issued by the Administrator most recently before the date of enactment of this subpart for determining attainment of the standard shall be applicable (including the design value, reference methods, and guidelines for interpretation of ozone air quality standards).

Not later than thirty days after the enactment of this subpart, the Administrator shall publish a notice of the percentages by which the national primary ambient air quality standard for ozone was exceeded in each area referred to in subsection (a).

"(c) DEADLINES FOR ATTAINMENT.–The following deadlines apply to the ozone nonattainment areas classified in accordance with subsection (a):

"Area classification	Applicable attainment due (in years after enactment of the Clean Air Act Amendments of 1989)
Moderate Area	5 years
Serious Area	10 years
Severe Area	15 years
Extreme Area	20 years

"(d) REFERENCES TO TERMS.–Any reference in this subpart to a 'moderate area', a 'serious area' a 'severe area', or an 'extreme area' shall be considered a reference to a moderate ozone nonattainment area, a serious ozone nonattainment area, a severe ozone nonattainment area, or an

extreme ozone nonattainment area as classified under this section.

"(e) Any area that is not designated nonattainment for ozone under section 107 as of the date of enactment of this section, and that is subsequently redesignated to nonattainment for ozone under section 107, shall, at the time of the redesignation, be classified by operation of law in accordance with the table under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified as of the time of the classification under subsection (a), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of enactment of this section and the date the area is classified.

* * *

APPENDIX C

H.R. 3030, 101st Cong., 2d Sess., § 103 (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)

SEC. 103. ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS.

Part D of title I is amended by adding the following new subpart at the end thereof:

"Subpart 2 –Additional Provisions for Ozone Nonattainment Areas

"Sec. 181. Classifications and attainment dates.
"Sec. 182. Plan submissions and requirements.
"Sec. 183. Federal ozone measures.
"Sec. 184. Control of interstate ozone air pollution.
"Sec. 185. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.
"Sec. 185A. Transitional areas.
"Sec. 185B. NO_x and VOC study.

"SEC. 181. CLASSIFICATIONS AND ATTAINMENT DATES.

"(a) CLASSIFICATION AND ATTAINMENT DATES FOR 1989 NONATTAINMENT AREAS.–(1) Each area designated nonattainment for ozone pursuant to section 107(d) shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation

methodology issued by the Administrator most recently before the date of the enactment of the Clean air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

"TABLE 1

Area class	Design Value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after enactment
Moderate	0.138 up to 0.160	6 years after enactment
Serious	0.160 up to 0.180	9 years after enactment
Severe	0.180 up to 0.280	15 years after enactment
Extreme	0.280 and above	20 years after enactment

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

"(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

"(3) At the time of publication of the notice under section 107(d)(4) (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) (relating to lack of notice and comment and judicial review) shall apply to such classification.

"(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

"(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the 'Extension Year') the date specified in Table 1 of subsection (a) if–

"(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

"(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

"(b) NEW DESIGNATIONS AND RECLASSIFICATIONS.–

"(1) NEW DESIGNATIONS TO NONATTAINMENT.–Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4), and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3), shall, at the time of the redesignation, be classified by operation of law in accordance with Table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

"(2) RECLASSIFICATION UPON FAILURE TO ATTAIN.—(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with Table 1 of subsection (a) to the higher of—

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

"(3) VOLUNTARY RECLASSIFICATION.—The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with Table 1 of subsection (a) to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) FAILURE OF SEVERE AREAS TO ATTAIN STANDARD.—(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 185 shall apply within the area, the percent reduction requirements of section 182(c)(2)(B) and (C) relating to reasonable further progress demonstration and NO_x control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a

Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 182(g), the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term 'major source' and 'major stationary source' shall have the same meaning as in Extreme Areas.

"(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

"(D) If, after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

"(c) REFERENCES TO TERMS.—(1) Any reference to this subpart to a 'Marginal Area', a 'Moderate Area', a 'Serious Area', a 'Severe Area' or an 'Extreme Area' shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

"(2) Any reference in this subpart to 'next higher classification' or comparable terms shall be considered a reference to the classification related to the next higher set of design values in Table 1.

* * *

APPENDIX D

H.R. Rep. No. 101-952, 101st Cong., 2d Sess. (1990) (Additional Provisions for Ozone Nonattainment Areas) (excerpt)

SEC. 103. ADDITIONAL PROVISIONS FOR OZONE NONATTAINMENT AREAS.

Part D of title I of the Clean Air Act is amended by adding the following new subpart at the end thereof:

"Subpart 2 –Additional Provisions for Ozone Nonattainment Areas

"Sec. 181. Classifications and attainment dates.
"Sec. 182. Plan submissions and requirements.
"Sec. 183. Federal ozone measures.
"Sec. 184. Control of interstate ozone air pollution.
"Sec. 185. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.
"Sec. 185A. Transitional areas.
"Sec. 185B. NO_x and VOC study.

SEC. 181. CLASSIFICATIONS AND ATTAINMENT DATES.

"(a) CLASSIFICATION AND ATTAINMENT DATES FOR 1989 NONATTAINMENT AREAS.—(1) Each area designated nonattainment for ozone pursuant to section 107(d) shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme

Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

"TABLE 1

Area class	Design Value*	Primary standard attainment date**
Marginal	0.121 up to 0.138	3 years after enactment
Moderate	0.138 up to 0.160	6 years after enactment
Serious	0.160 up to 0.180	9 years after enactment
Severe	0.180 up to 0.280	15 years after enactment
Extreme	0.280 and above	20 years after enactment

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

"(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

"(3) At the time of publication of the notice under section 107(d)(4) (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) (relating to lack of notice and comment and judicial review) shall apply to such classification.

"(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

"(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the 'Extension Year') the date specified in table 1 of paragraph (1) of this subsection if–

"(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

"(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

"(b) NEW DESIGNATIONS AND RECLASSIFICATIONS.–

"(1) NEW DESIGNATIONS TO NONATTAINMENT.–Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4), and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3), shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

"(2) RECLASSIFICATION UPON FAILURE TO ATTAIN.—(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) to the higher of—

"(i) the next higher classification for the area, or

"(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

"(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date, identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

"(3) VOLUNTARY RECLASSIFICATION.—The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) FAILURE OF SEVERE AREAS TO ATTAIN STANDARD.—(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 185 shall apply within the area, the percent reduction requirements of section 182(c)(2)(B) and (C) relating to reasonable further progress demonstration and NO_ control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 182(g), the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term 'major source' and 'major stationary source' shall have the same meaning as in Extreme Areas.

"(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

"(D) If, after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

"(c) REFERENCES TO TERMS.—(1) Any reference to this subpart to a 'Marginal Area', a 'Moderate Area', a 'Serious Area', a 'Severe Area', or an 'Extreme Area' shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

"(2) Any reference in this subpart to 'next higher classification' or comparable terms shall be

considered a reference to the classification related to the next higher set of design values in table 1.

* * *

APPENDIX E

Brief of Respondent United States Environmental Protection Agency, *Environmental Defense Fund v. Browner* (D.C. Cir. No. 98-1363) (excerpt)

ORAL ARGUMENT SCHEDULED
FOR SEPTEMBER 7, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1363

ENVIRONMENTAL DEFENSE FUND, et al.,
Petitioners,

v.

CAROL M. BROWNER, et al.,
Respondent,

ON PETITION FOR REVIEW OF FINAL ACTION
OF THE U.S. ENVIRONMENTAL
PROTECTION AGENCY

FINAL BRIEF OF RESPONDENT
U.S. ENVIRONMENTAL PROTECTION AGENCY

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural
Resources Division

OF COUNSEL:

JAN M. TIERNEY
Office of General Counsel
U.S. Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20604
(202) 260-5095

ALICE L. MATTICE
Attorney, Environmental
Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2327

Date: June 21, 1999

* * *

Section 307(b) of the Act establishes a sixty-day period for seeking judicial review of agency rules. 42 U.S.C. § 7607(b). This Court has "repeatedly held that temporal limitations on judicial review are jurisdictional in nature." *National Mining Ass'n v. Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995); *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911-12 (D.C. Cir. 1985). The time limits on petitions for review of agency rules reflect a deliberate congressional choice to impose finality on agency decisions, in order to conserve agency resources and provide guidance and stability to those affected by the agency action. *Eagle-Picher*, 795 F.2d at 911-12.

Petitioners' central claim in this case is that EPA's criterion for phasing out the one-hour ozone NAAQS is unlawful because it does not require redesignating "clean" nonattainment areas to attainment pursuant to section 107(d)(3)(E) of the Act, 42 U.S.C. § 7407(d)(3)(E)(iv), and therefore does not require States to submit plans for maintaining the one-hour NAAQS indefinitely after

attainment. Pet.Br. 2, 21, 31-33, 42. [19] However, that issue was resolved by EPA's 1997 Rule. 40 C.F.R. § 50.9(b).

The 1997 Rule is clear on its face. The Rule states, without qualification, that the one-hour standard "will no longer apply" to an area once EPA determines that it has "air quality meeting the 1-hour standard." 40 C.F.R. § 50.9(b). Thus, "air quality meeting the 1-hour standard" is the only criterion for revocation. The Rule also specifically states that "[a]rea designations are codified in 40 CFR part 81," which includes the list of designations of areas for the one-hour ozone standard. *Id.* The inclusion of this reference provides notice that the designations for the one-hour standard in 40 C.F.R. part 81 would be affected by EPA's action. *Id.*

Petitioners attempt to draw an artificial distinction between the revocation of the one-hour standard (which they appear to concede was addressed in the 1997 Rule) and the allegedly "separate" decision to remove the associated *designations* for revocation areas in 40 C.F.R. part 81. Pet.Br. 30. However, designations are for a particular NAAQS and are linked to that NAAQS. *E.g.*, 42 U.S.C. § 7407(d)(1)(A)(i)-(ii) ("attainment" and "nonattainment" designations defined as meeting or not meeting a particular

---

[19] Although they now challenge the removal of attainment or unclassifiable designations in summary fashion (Pet.Br. 2, 4), Petitioners did not object to the removal of attainment or unclassifiable designations in their comments, and therefore cannot do so here. *See* EDF Comments, JA 182-188; NRDC Comments, JA 189-194. *Linemaster Switch Corp. v. EPA*, 938 F. 2d 1299, 1308-09 (D.C. Cir. 1991). In any event, Petitioners' alleged injury - an asserted "gap" in PSD requirements for areas designated attainment or unclassifiable - is illusory. As discussed above, Petitioners read EPA's PSD regulations too narrowly. PSD will in fact continue to apply to such areas. *Supra* 21.

NAAQS); *see infra* 43-44.[20] In its implementation policy statement issued contemporaneously with the ozone NAAQS proposal, *supra* 13, EPA made clear that it viewed revocation of the one-hour standard as also revoking the associated designations: "the designations [for the one-hour standard] would remain in effect so long as the current 1-hour ozone NAAQS remains in effect," 61 Fed. Reg. at 65,754 -- and, by necessary implication, would not remain in effect thereafter.

As discussed above, EPA initially proposed an approach similar to the one Petitioners urge here, whereby the Agency would delay revocation of the one-hour standard (and thus the associated designations) until it made designations for the revised eight-hour standard. *Id.*; *see supra* 13. However, EPA changed that approach in light of its revised legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority. 62 Fed. Reg. at 38,873; *supra* 13-14. In this context, the decision to revoke the one-hour standard necessarily meant that EPA was also revoking the designations associated with it. Petitioners were active and highly sophisticated participants in both the NAAQS rulemaking and the discussions on implementation, and could not reasonably have understood otherwise.[21]

---

[20] Petitioners elsewhere assert (Pet.Br. 36, 38-39) that designations are linked to "the pollutant ozone," not to particular NAAQS. As demonstrated below, that argument is not supported by the statutory language and is plainly incorrect. *Infra* 43-45.

[21] EDF and NRDC submitted comments on the proposed ozone and particulate matter NAAQS revisions and on EPA's proposed implementation guidance. Further, EDF and NRDC were members of the Subcommittee for Ozone, Particulate Matter, and Regional Haze, part of the Clean Air Act Advisory Committee created pursuant to the Federal Advisory Committee Act. The Subcommittee's purpose was to develop and recommend to EPA strategies for the implementation of the ozone and

Further, if there were any room for doubt as to EPA's meaning, the Presidential Memorandum, issued contemporaneously with and referenced in the preamble to the 1997 Rule (at 62 Fed. Reg. 38,856) removed it. The Memorandum was explicit, stating that under the 1997 Rule States "will not have to provide maintenance plans for those areas that attain the [one]-hour standard." 62 Fed. Reg. at 38,424. Petitioners thus had clear notice that EPA was *not* requiring States to develop maintenance plans. Because maintenance plans are required only as a prerequisite for redesignation under section 107(d)(3)(E), Petitioners also had clear notice that EPA was not retaining the one-hour designations that would otherwise have made maintenance plans relevant.

Other participants in the NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation concerning the revised ozone NAAQS. Indeed, those arguments are premised on their recognition that the one-hour standard (and thus the programs associated with it) would *not* be revoked for an area until the standard was met, but then *would* be revoked. Specifically, in *ATA*, industry and State petitioners argued that the continued applicability of the one-hour standard and Subpart 2 prohibited EPA from revising the one-hour standard and associated designations *at all*, in part because EPA's action created an alleged "patchwork" of different control requirements associated with different

---

particulate matter standards and the regional haze strategy, which EPA was then developing.

standards.[22] Thus, the petitioners in *ATA* well recognized that the 1997 Rule removed all planning requirements for the one-hour standard for an area, once that standard was revoked.

Petitioners here were similarly on notice of the issues resolved by the 1997 Rule; indeed, they now challenge EPA's determination regarding the interplay between the pre-existing one-hour and the revised eight-hour standard from a different perspective. Having apparently made a decision not to raise those issues at that time, they cannot do so now. Further, even if Petitioners had some doubt,[23] their proper course would have been to file a protective petition for review and let the Court decide whether the case was properly brought. *See Eagle-Picher*, 759 F.2d at 914 (in the analogous ripeness context, ". . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being time-barred") (emphasis in original). As *Eagle-Picher* instructs, *id.* at 912, the risk of guessing wrong should fall on Petitioners, not the Court, EPA, or the communities and States relying on EPA's rule.

* * *

[22] *See American Trucking Ass'ns, Inc., et al. v. EPA*, No. 97-1441 and consolidated cases, Brief of Non-State Clean Air Act Petitioners and Intervenors 22-25, JA 211-215; Brief of Petitioner States 5-9 & n.4, JA 217-221; Reply Brief of Petitioner States 8-10, JA 223-225.

[23] Petitioners do not address the timeliness issue in their brief. At most, they hint obliquely that the Revocation Rule was the first time they understood that EPA was removing designations associated with the one-hour standard, and was not requiring areas previously designated nonattainment to prepare maintenance plans for the one-hour standard. Pet. Br. 28, 43-44. As demonstrated above, their asserted confusion is not credible.

APPENDIX F

Appalachian Power Co., *et al.*, Petition for D.C. Circuit Review of EPA Ozone NAAQS Rulemaking

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPALACHIAN POWER COMPANY, et al., Petitioners,	
v.	Docket No.__
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), Appalachian Power Company, et al., hereby petition the Court to review a final rule issued by Respondent United States Environmental Protection Agency. This rule revises the national ambient air quality standards (NAAQS) for ozone. The rule is entitled "National Ambient Air Quality Standards for Ozone," and it was published on July 18, 1997 at 62 Federal Register 38,856-96. The Petitioners are listed in Attachment A to this petition. Petitioners own and operate facilities that will be affected by this final rule. A copy of the Federal Register notice announcing this final rule is Attachment B to this petition.

Respectfully submitted,

Henry V. Nickel
F. William Brownell
Lucinda Minton Langworthy
Ross S. Antonson
HUNTON & WILLIAMS
1900 K Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 955-1500

Counsel for Appalachian Power Company, et al.

Dated: August 15, 1997

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

(24)

No. 99-1257

In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

---

BRIEF OF RESPONDENT STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
JAMES G. TASSIE
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

BEST AVAILABLE COPY

54pp

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's (EPA's) standardless interpretation of Sections 108 and 109 of the Clean Air Act (the Act), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals had jurisdiction to review, as a final agency action ripe for review, EPA's promulgation of a revised National Ambient Air Quality Standard (NAAQS) for ozone.

3. Whether EPA had authority to promulgate and implement a NAAQS for ozone different from the ozone NAAQS and implementing requirements set by Congress in Subpart 2 of Part D of the Act.

TABLE OF CONTENTS

Page

RESTATEMENT OF THE QUESTIONS PRESENTED....i

TABLE OF AUTHORITIES.....vi

INTRODUCTION.....1

COUNTERSTATEMENT OF THE CASE.....2

I. THE STATUTORY FRAMEWORK.....2

II. THE OZONE RULEMAKING.....4

A. The 1996 Proposal; EPA's Interim Policy...4

B. The 1997 Rulemaking.....6

III. THE D.C. CIRCUIT DECISION.....7

SUMMARY OF ARGUMENT.....8

ARGUMENT.....10

I. THE COURT NEED NOT ADDRESS THE NON-DELEGATION QUESTION.....10

II. EPA HAS NO AUTHORITY TO REVISE THE OZONE STANDARD OR THE IMPLEMENTING REQUIREMENTS SET BY CONGRESS IN SUBPART 2.....10

TABLE OF CONTENTS - Continued

Page

A. EPA's Revision Of The Ozone Standard And Implementing Requirements Conflicts With Subpart 2 And, Therefore, Is Unlawful. 13

1. EPA's revised standard conflicts with the one-hour standard codified in Subpart 2 14

2. EPA's revised standard conflicts with the classifications and attainment dates set by operation of law in Subpart 2 16

3. EPA's revised standard changes the state planning requirements imposed by Subpart 2 19

4. EPA's revised standard conflicts with Congress's overall approach to implementing and attaining a national ozone standard. 21

TABLE OF CONTENTS - Continued

Page

B. The Act Offers EPA No Authority To Revise The One-Hour Ozone Standard Or To Implement A New Standard 26

1. The Act offers EPA no general authority to designate ozone nonattainment areas, to classify those areas, or to set dates for attainment of a revised ozone standard 26

2. The Act offers EPA no general authority to revise the one-hour ozone standard 28

III. EPA'S ACTION TO REVISE THE ONE-HOUR STANDARD AND IMPLEMENT A NEW STANDARD WAS A FINAL AGENCY ACTION RIPE FOR REVIEW 32

A. The Court Need Not Address The Questions Of Finality Or Ripeness 32

B. Consideration Of Traditional Notions Of Finality And Ripeness Leads Inevitably To The Conclusion That EPA's Rulemaking Was Final Agency Action Ripe For Review 33

TABLE OF CONTENTS - Continued

Page

1. EPA's rulemaking was "agency action" within Section 307 of the Act 34

2. The entire rule constitutes "final" agency action that is judicially reviewable.....35

3. EPA's action is ripe for review.....38

CONCLUSION.....40

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967).....38
American Trucking Associations, Inc. v. United States Environmental Protection Agency,
175 F.3d 1027 modified, 195 F.3d 4
(D.C. Cir. 1999).....passim
Bennett v. Spear,
520 U.S. 154 (1997).....35
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984).....11, 12
Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948).....35
Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989).....22
Dayton Board of Ed. v. Brinkman,
433 U.S. 406 (1977).....12
ETSI Pipeline Project v. Missouri,
484 U.S. 495 (1988).....11
Federal Trade Commission v. Standard Oil,
449 U.S. 232 (1980).....34
Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,
___ U.S. ___, 120 S. Ct. 1291 (2000) .....passim
MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,
512 U.S. 218 (1994).....11, 13, 31

TABLE OF AUTHORITIES - Continued

Page

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983).....39
Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).....35
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).....12

REGULATIONS

40 C.F.R. 50.9(b).....7, 33, 36
40 C.F.R. 50.10(a).....6
40 C.F.R. 51.390.....38
40 C.F.R. Part 93, Subpart A.....38

STATUTES

Clean Air Act;
42 U.S.C. 7401 *et seq.*.....2
Clean Air Act §101(b);
42 U.S.C. 7401(b).....11
Clean Air Act §107;
42 U.S.C. 7407.....27, 28, 30, 36
Clean Air Act §107(d);
42 U.S.C. 7407(d).....37
Clean Air Act §107(d)(1);
42 U.S.C. 7407(d)(1).....18, 26, 27, 37

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §107(d)(4);
42 U.S.C. 7407(d)(4).....27
Clean Air Act §108;
42 U.S.C. 7408.....2, 29
Clean Air Act §109;
42 U.S.C. 7409.....2, 11, 28
Clean Air Act §109(a);
42 U.S.C. 7409(a).....29
Clean Air Act §109(b);
42 U.S.C. 7409(b).....2, 29
Clean Air Act §109(d);
42 U.S.C. 7409(d).....2
Clean Air Act §110;
42 U.S.C. 7410.....2
Clean Air Act §172;
42 U.S.C. 7502.....27, 28, 30
Clean Air Act §172(a);
42 U.S.C. 7502(a).....26
Clean Air Act §172(a)(1);
42 U.S.C. 7502(a)(1).....27, 28, 37
Clean Air Act §172(a)(2);
42 U.S.C. 7502(a)(2).....18, 28
Clean Air Act §172(b);
42 U.S.C. 7502(b).....37
Clean Air Act §173;
42 U.S.C. 7503.....37
Clean Air Act §173(a)(1);
42 U.S.C. 7503(a)(1).....37
Clean Air Act §173(a)(2);
42 U.S.C. 7503(a)(2).....37
Clean Air Act §173(a)(5);
42 U.S.C. 7503(a)(5).....37

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §176;
42 U.S.C. 7506 37
Clean Air Act §176(c);
42 U.S.C. 7506(c) 37
Clean Air Act §181;
42 U.S.C. 7511 .....passim
Clean Air Act §181(a);
42 U.S.C. 7511(a), ...8,17
Clean Air Act §181(a)(1);
42 U.S.C. 7511(a)(1), ...14, 16, 17, 30
Clean Air Act §181(b)(1), (2);
42 U.S.C. 7511(b)(1), (2),.....14, 16
Clean Air Act §181(b)(2);
42 U.S.C. 7511(b)(2), ...14, 19
Clean Air Act §181(b)(4);
42 U.S.C. 7511(b)(4), ...19
Clean Air Act §182;
42 U.S.C. 7511a.....3, 19, 20, 21
Clean Air Act §182(a)(1);
42 U.S.C. 7511a(a)(1).....21
Clean Air Act §182(a)(3);
42 U.S.C. 7511a(a)(3).....21
Clean Air Act §182(e)(3);
42 U.S.C. 7511a(e)(3).....20
Clean Air Act §182(g)(1);
42 U.S.C. 7511a(g)(1) 20
Clean Air Act §183;
42 U.S.C. 7511b 4
Clean Air Act §184;
42 U.S.C. 7511c.....4
Clean Air Act §185(B);
42 U.S.C. 7511f 4

TABLE OF AUTHORITIES - Continued

Page

Clean Air Act §307;
42 U.S.C. 7607 .....10, 34
Clean Air Act §307(b)(1);
42 U.S.C. 7607(b)(1) 33, 34
5 U.S.C. 551(13).....34
42 U.S.C. 7502 (1988).....2

FEDERAL REGISTER

61 Fed. Reg. 65716 (1996) 4
61 Fed. Reg. 65752 (1996) 4
61 Fed. Reg. 65754 (1996) 5
61 Fed. Reg. 65756 (1996) 6
61 Fed. Reg. 65757 (1996) 6
61 Fed. Reg. 65761 (1996) 6
62 Fed. Reg. 38856 (1997) 6
62 Fed. Reg. 38857 (1997) 6
62 Fed. Reg. 38863 (1997) 6
62 Fed. Reg. 38867 (1997) 6
62 Fed. Reg. 38873 (1997) 7, 36
62 Fed. Reg. 38883 (1997) 6
62 Fed. Reg. 38885 (1997) 7
62 Fed. Reg. 38894 (1997) 7, 33, 36
65 Fed. Reg. 45182 (2000) 29
65 Fed. Reg. 45185 (2000) 29

TABLE OF AUTHORITIES - Continued

Page

LEGISLATIVE HISTORY

H.R. Rep. No. 101-490 (1990), reprinted II Senate Comm. on Env. And Public Works, 103[d] Cong., 1st Sess., *Legislative History of the Clean Air Act Amendments of 1990*, (1993) ("1990 Legislative History").....passim
H.R. Conf. Rep. No. 101-952 (1990) reprinted in 1 1990 *Legislative History* 16, 20
Senate Debate (January 23, 1990), reprinted in II *1990 Legislative History* at 4837 (statement of Sen. Chafee).....20
Senate Debate (October 27, 1990), reprinted in I *1990 Legislative History* at 948 (comments of Sen. Chafee).....20
H.R. 2323, 101st Cong., Section 181(e) (1989), as introduced, reprinted in II *1990 Legislative History* at 4060.....15
S. Rep. 100-231 (1987), reprinted in V 1990 *Legislative History*.....25
S. Rep. 101-228 (1989) reprinted in V 1990 *Legislative History* at 8350.....22, 23, 25
S. 1894, 100th Cong., Section 402 (1987), as reported, reprinted in VI 1990 *Legislative History* at 9390.....25
S.Doc. No. 248, 79th Cong., 2nd Sess. 255 (1946) 35

MISCELLANEOUS

38 *Admin. L. Rev.* 363, 370 (1986).....13

INTRODUCTION

This case asks a question this Court has answered many times – whether the acts of an administrative agency go beyond the authority granted by Congress. Although the case arises in a scientific context and a complex regulatory scheme, the legal principles are quite simple.

An administrative agency has only those powers granted by Congress. An agency's ordinary and general powers may not override Congress's specific instruction and limitation with respect to a particular action or program. And, wherever Congress has expressed its intent, an agency may not take conflicting action.

Here, these basic rules apply to limit the power of the United States Environmental Protection Agency (EPA). Ten years ago, Congress spoke clearly and comprehensively to the problem of ozone control in this country. Recognizing the failure of the existing approach, the complexity and uncertainty of the science, and the enormous costs associated with compliance, Congress created a detailed program that balances realistic expectations and requirements for continuing progress.

But just six years later, before Congress's plan had reached even mid-stream, EPA began dismantling it. Although EPA struggled, throughout its rulemaking, to define the limits of its authority to take these actions, EPA apparently has resolved that struggle here, now arguing that it may change Congress's plan at any time and in whatever manner it chooses. As the court of appeals recognized, if EPA had such unlimited authority, the congressional scheme would have been stillborn had EPA taken this action immediately after Congress acted. Congress could not have intended such an illogical result, and, applying the most basic of legal principles, EPA's actions in pursuit of such an unauthorized end must be reversed.

COUNTERSTATEMENT OF THE CASE

I. THE STATUTORY FRAMEWORK

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401 *et seq.* (the Act, cited as CAA), applied an identical statutory program for ozone and five other specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. The Act also required EPA to review and revise the criteria and standards every five years and to "promulgate such new standards as may be appropriate" in accordance with Section 108, 42 U.S.C. 7408, which requires EPA to establish criteria, and Section 109(b), 42 U.S.C. 7409(b), which requires EPA to set national standards requisite to protect the public health. CAA §109(d); 42 U.S.C. 7409(d).

Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies for meeting each standard in each defined "area" of the State. Each state plan had to provide for attainment of the national standard within five years of the 1977 amendments to the Act, with the possibility of a five-year extension. In this way, the Act required that all areas of the country not meeting the primary ozone standard, no matter how far from attainment, come into compliance "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. 7502 (1988).

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States meet each standard by a fixed date – had failed with regard to ozone. Many areas had not met the ozone standard; some

were a long way from doing so. Congress responded to this continuing ozone problem by developing a new approach and enacting a unique program for ozone. In Subpart 2 of Part D of the amended Act, CAA §§181-185B, 42 U.S.C. 7511-7511f, Congress created an elaborate plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour, 0.12 parts per million (0.12 ppm) standard, which Congress codified in Subpart 2.

As described more fully below, "by operation of law," Subpart 2 classifies areas that have not achieved the standard ("nonattainment areas") based upon their design value, which is a rough measure of whether an area complies with the one-hour, 0.12 ppm ozone standard. A table in Subpart 2 establishes classifications ranging from Marginal to Extreme, depending on how far an area is from meeting the standard, and provides a specific date by which the areas within each class must attain the standard (an "attainment date"). CAA §181; 42 U.S.C. 7511.

Subpart 2 also specifies state plan requirements for each class. The scheme begins with requirements applicable to Marginal areas, and then adds increasingly more stringent requirements for each additional classification further from attainment. These plan requirements include mandatory pollution control measures, annual emission reductions, and offsets for emissions from new or modified stationary sources. Congress anticipated that these requirements would apply well into the future, and that they would continue to apply, not only during the 20-year period before the final attainment date, but until all areas of the country meet the 0.12 ppm, one-hour standard. CAA §182; 42 U.S.C. 7511a.

In addition to the designation, classification, and planning requirements, Subpart 2 includes other

requirements: interstate ozone transfer control, CAA §184; 42 U.S.C. 7511c; EPA guidelines for sources of chemicals that are precursors to the formation of ozone, CAA §183; 42 U.S.C. 7511b; and studies that EPA must conduct, the results of which must be reported to Congress, *e.g.*, CAA §185B; 42 U.S.C. 7511f. As the court of appeals recognized, "Subpart 2 is the Congress's comprehensive plan for reducing ozone levels throughout the country." *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, 1046, modified, 195 F.3d 4 (D.C. Cir. 1999); Petitioner's Appendix (Pet. App.) at 33a.

II. THE OZONE RULEMAKING

On July 18, 1997, EPA changed Congress's plan for achieving a national ozone standard. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm, and imposing requirements different from those in Subpart 2.

Cross-Petitioners, at pages 4-11 of their brief in Case No. 99-1426, comprehensively discuss the ozone rulemaking. The Respondent States adopt that discussion and simply highlight here those aspects of the rulemaking that relate most directly to the issues of EPA's authority under Subpart 2 and the finality and ripeness of EPA's action.

A. The 1996 Proposal; EPA's Interim Policy

EPA first proposed to revise the one-hour standard in a notice of proposed rulemaking in 1996. 61 Fed. Reg. 65716 (1996). At the same time, EPA issued an "Interim Implementation Policy on New or Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)." 61 Fed. Reg. 65752 (1996). While this interim policy served only as guidance and did not bind

the States or the general public as a matter of law, EPA issued the policy to "ensure momentum is maintained by the States in the current program while moving toward developing their plans for implementing" the new standards. *Id.* As such, it represented EPA's preliminary views on implementation of a new ozone standard.

EPA's interim policy plainly stated that, in EPA's view, the specific requirements of Subpart 2 do not directly apply to implementation of a new or revised ozone standard. It confirmed that EPA intended to revoke the one-hour standard for an area immediately upon EPA's approval of a revision to the state's plan (SIP) for achieving the new standard in that area. 61 Fed. Reg. 65754 (1996). EPA noted, however, that certain aspects of the 0.12 ppm, one-hour standard would be lifted immediately, even before states submitted plans to achieve the new standard.

First, the requirement to demonstrate attainment of the one-hour standard by the attainment dates set forth in Subpart 2 would no longer be necessary because those dates "will be superseded by a new requirement to attain the new NAAQS by new dates." 61 Fed. Reg. 65754 (1996). This followed from EPA's belief that "it is appropriate for areas to shift their efforts to develop attainment demonstrations from the existing NAAQS to the new NAAQS." *Id.*

Second, EPA, through this guidance, revoked the provisions for reclassification of an area if it failed to meet the one-hour standard by the applicable attainment dates in Subpart 2. EPA stated that such areas "need not have to comply with the additional specified control measures that they would have been subject to had they been reclassified in accordance with the provisions of subpart 2." *Id.*

Finally, EPA discussed its intent to change and/or revoke many of the program requirements imposed under

Subpart 2. As for attainment demonstrations for Serious, Severe, and Extreme areas, EPA recognized that many of these areas had been unable to complete plan requirements within the schedules provided by Subpart 2. As such, in light of EPA's planned promulgation of a new standard, "EPA believes that after promulgation of a new or revised ozone NAAQS, States should no longer be required to provide full demonstration-of-attainment SIP's for the 1-hour NAAQS; however, States are obliged to continue attainment planning toward the new NAAQS." 61 Fed. Reg. 65756 (1996). Meanwhile, EPA proposed to permit States to submit urban modeling to establish emissions reductions, "but not the specific measures necessary to attain the 1-hour NAAQS by the attainment dates set forth in subpart 2." *Id.* *See also* 61 Fed. Reg. 65757 (1996)(proposing to change the requirements for Marginal and Moderate areas); 61 Fed. Reg. 65761 (1996)(proposing to change the requirements for review of new sources of air pollution).

B. The 1997 Rulemaking

On July 18, 1997, EPA published a final rule that issued a new eight-hour, 0.08 ppm standard, which became effective on September 16, 1997. 40 C.F.R. 50.10(a); 62 Fed. Reg. 38857 (1997). EPA stated that it based this new standard on a "policy" judgment that the new standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38856, 38857, 38863, 38867 (1997). EPA also asserted the right to render a decision that follows "no generalized paradigm" that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38883.

EPA acknowledged that at the time of its first proposal, it had interpreted the Act in such a way that the

provisions of Subpart 2 would not apply to existing nonattainment areas once a new standard became effective. EPA stated in its final rulemaking, however, that it had "reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to [ozone] nonattainment areas for purposes of achieving attainment of the current 1-hour standard." 62 Fed. Reg. 38873 (1997). Once an area attains the one-hour standard, however, Subpart 2 would no longer apply. *Id.* To codify this interpretation, EPA issued as a final rule 40 C.F.R. 50.9(b), which states, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 62 Fed. Reg. 38894 (1997).

EPA's action thus imposed two standards for parallel implementation: the eight-hour standard for areas that met the one-hour standard, and the one-hour standard for areas that did not. For the areas where the new eight-hour standard would apply, EPA's action imposed the implementing requirements that apply to other pollutants and that applied to ozone prior to 1990. 62 Fed. Reg. 38885 (1997).

III. THE D.C. CIRCUIT DECISION

In the D.C. Circuit, the petitioning States and industry groups (Respondents here) argued that Subpart 2 codified the one-hour, 0.12 ppm standard and provided the exclusive means for ozone regulation; therefore, EPA could not promulgate a new ozone standard. No party, including EPA, distinguished "revision of the standard" and "designation as nonattainment" from "enforcement" or "implementation" of that revised standard or nonattainment designation. The court, however, did make that distinction. The court held, first, that EPA may revise the ozone standard and, based on that revised standard, may designate areas as nonattainment, but, second, that EPA may not implement the revised

standard or otherwise implement the designation in a way that conflicts with Subpart 2. *See* Pet. App. at 1a, 70a. The court remanded, but did not vacate, the new eight-hour standard on the basis that the standard would not "engender costly compliance activities" in light of its decision that the standard "cannot be enforced by virtue of" Section 181(a) (42 U.S.C. 7511a). 175 F.3d at 1057; Pet. App. at 57a.

In response to the D.C. Circuit's opinion, EPA argued for the first time in a petition for rehearing, as it argues here, that its decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argued, the court's jurisdiction ended with its review of whether the statutory provisions at issue precluded EPA from promulgating the revised standard. On rehearing, the court rejected EPA's ripeness argument and determined that EPA's action was final and that it was ripe for review. 195 F.3d at 10-13; Pet. App. at 77a-79a.

SUMMARY OF ARGUMENT

In 1990, Congress created a comprehensive structure for ozone regulation – Subpart 2. That structure codifies the national one-hour standard of 0.12 ppm, classifies areas according to how far they are from achieving that standard, sets specific dates by which these areas, according to their classifications, must attain a specific ozone reduction, and imposes planning requirements upon States to ensure continuing progress. This comprehensive scheme and the legislative history to its enactment show that Congress rejected the old approach to ozone regulation – simply commanding States to comply with a standard by a certain date – and instead took a more realistic approach to nationwide ozone compliance.

The EPA action at issue here dismantles that structure. EPA's action changes the one-hour, 0.12 ppm

standard to a more stringent eight-hour, 0.08 ppm standard, changes the classifications and attainment dates, and changes the state planning requirements. Even more, EPA's action ignores Congress's overall approach to ozone regulation and returns the States to the unrealistic and ineffective scheme that Congress abandoned in 1990.

EPA has no authority to take these actions. EPA may not exercise its authority in a way that is inconsistent with the administrative structure that Congress enacted into law in Subpart 2. Although courts generally defer to an agency's interpretation of the statute it administers, an agency must give effect to the unambiguously expressed intent of Congress. Here, Congress's express intent is that Subpart 2, including the one-hour, 0.12 ppm standard and the comprehensive implementing requirements, is the exclusive scheme for ozone regulation in this country and EPA may not take action in conflict with it.

Nor will EPA find in the Act more general provisions that give broader authority. The provisions upon which EPA relies expressly exempt from its general authority the power to designate ozone nonattainment areas or to classify and set ozone attainment dates. In addition, EPA's general authority to revise standards is limited to "appropriate" changes. Since EPA is unable to designate or classify ozone nonattainment areas or to set attainment dates for such areas, it was not "appropriate" for EPA to revise the one-hour standard.

Correctly framed, this case is not merely about implementation of a revised standard, as EPA suggests. Rather, it is about EPA's authority to revise the standard in the first instance, *i.e.*, its power to revoke Congress's plan for regulation of ozone and to set into motion requirements for state action to implement a new and different standard. As EPA concedes, promulgation of an air standard is undoubtedly "agency action" and subject to review under

Section 307 of the Act, 42 U.S.C. 7607. Thus, EPA's rulemaking leaves no doubt that the issues before this Court are subject to judicial review.

Finally, even under traditional notions of finality and ripeness, the serious consequences that flow immediately from EPA's action leave no doubt that it is sufficiently final and ripe for review. These inevitable consequences also demonstrate the substantial and widespread impact of EPA's changes. For better or worse, however, Congress has spoken clearly and comprehensively to the control of ozone in this country. Congress having spoken, EPA may not abrogate the congressional plan.

ARGUMENT

I. THE COURT NEED NOT ADDRESS THE NON-DELEGATION QUESTION.

As the Respondent States argued in a brief in support of Cross-Petitioners in the companion case, No. 99-1426, interpreting the Act in a way that permits consideration of costs and other non-health factors avoids the need to reach the constitutional, non-delegation question (Question 1). Instead, as Cross-Petitioners and our co-Respondents assert, the Court should vacate EPA's particulate matter standard and remand to the Agency for further proceedings. No comparable remand of EPA's ozone standard is necessary, however, because, as argued below, EPA had no authority to revise the one-hour ozone standard.

II. EPA HAS NO AUTHORITY TO REVISE THE OZONE STANDARD OR THE IMPLEMENTING REQUIREMENTS SET BY CONGRESS IN SUBPART 2.

The Clean Air Act places upon EPA and the States the joint responsibility "to protect and enhance the quality of

the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA §101(b); 42 U.S.C. 7401(b). EPA must promulgate national air standards; the States must implement them. CAA §§109, 110; 42 U.S.C. 7409, 7410. To be sure, EPA's duty to promulgate standards is a responsibility of the highest order. Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). Accord *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994). And even though agencies are generally entitled to deference in the interpretation of the statutes they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, 1300 (2000).

In this case, EPA argues that it may revise and implement an ozone standard that is different from Subpart 2 because Congress expressed no other intent. To argue this, EPA looks first to the general provisions of the Act. The proper beginning point for determining Congress's intent with respect to ozone, however, is Congress's comprehensive program for ozone, Subpart 2. To argue that Congress did not express an intent to preclude EPA from revising the one-hour standard or implementing a standard differently, EPA must overlook the key components of Subpart 2 – the standard, the classifications and attainment dates, and the state planning requirements. EPA must also overlook the overall structure that these and other provisions combine to create and the intent that Congress expressed in Subpart 2's overall regulatory scheme. While EPA may choose to see

neither these key components nor the overall structure, as described below, a clear view of Subpart 2 reveals Congress's comprehensive scheme for ozone regulation and EPA may not take action in conflict with it.[1]

Nor may EPA look beyond Subpart 2 to find more general provisions that appear to give EPA contrary authority, as the Act offers none. Even beyond Subpart 2, Congress consistently expressed the intent that Subpart 2 was the sole mechanism for ozone regulation and that EPA has no authority to ignore or dismantle it.

If any doubt remains, this Court's inquiry into whether Congress has directly spoken to the precise question at issue is shaped, as it was in *Brown & Williamson*, "at least in some measure, by the nature of the question presented." *Id.*, 120 S.Ct. at 1314. A court premises deference to an agency's construction of a statute that it administers on the theory that a statute's ambiguity constitutes an implicit directive from Congress to the agency to fill in the statutory gaps. *See Chevron,* 467 U.S. at 844. This Court has recognized, however, that in some cases "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Brown & Williamson*, 120 S.Ct. at 1314, citing Breyer, Judicial Review of

[1] Although EPA understandably does not challenge the D.C. Circuit's finding that EPA has the authority to revise the ozone standard, Respondents are not precluded from arguing that that decision is incorrect. "A prevailing party, without cross-petitioning is 'entitled under [this Court's] precedents to urge any grounds which would lend support to the judgment below.'" *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), quoting *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 419 (1977). As we argue here, if EPA cannot revise the standard, this Court must affirm the lower court judgment because there would be no standard for EPA to implement.

Questions of Law and Policy, 38 *Admin. L. Rev.* 363, 370 (1986)("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration"). Accord *MCI v. AT&T*, 512 U.S. at 231. As the court of appeals recognized, this is just such a case. As the express language of the Act, the legislative history, and the overall statutory scheme show, Congress left no gap for EPA to fill. Instead, Congress expressed its intent that Subpart 2 be the exclusive scheme for ozone regulation. EPA may not change Congress's plan.

A. EPA's Revision Of The Ozone Standard And Implementing Requirements Conflicts With Subpart 2 And, Therefore, Is Unlawful.

From 1977 until 1990, the Clean Air Act sought to control ozone, as it did the other specified pollutants, by simply commanding all areas of the country to achieve a set standard by a specific deadline. By 1990, however, it was clear that this "one size fits all" approach was not working for ozone. Many areas had still not achieved the standard; some were a long way from doing so. With knowledge of this failure, instead of simply waving its "magic wand" again and commanding States to comply by a certain arbitrary date, H.R. Rep. No. 101-490 (1990), reprinted in II Senate Comm. on Env. and Public Works, 103^{d} Cong., 1st Sess., *Legislative History of the Clean Air Act Amendments of 1990*, at 3170-71 (1993) ("*1990 Legislative History*"), Congress crafted a unique and more realistic approach to ozone compliance – Subpart 2.

As described below, EPA's ozone rulemaking changes Congress's approach for areas that have met the one-hour standard, and EPA argues before this Court that it has

the authority to go even further, to change this approach for all areas throughout the country. EPA Brief at 20. As the court of appeals recognized, if EPA had such unlimited authority, Congress's "scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." 175 F.3d at 1050; Pet. App. at 42a. Congress could not have intended such an illogical result, and EPA's actions in pursuit of such an end must be reversed.

1. EPA's revised standard conflicts with the one-hour standard codified in Subpart 2.

When Congress amended the Act in 1990, it codified the one-hour, 0.12 ppm ozone standard existing at the time. Congress did so in Section 181, which classifies areas according to their "design value," which is a measure of whether an area complies with the 0.12 ppm, one-hour standard. CAA §181(a)(1); 42 U.S.C. 7511(a)(1).[2] Section 181, indeed all of Subpart 2, begins from this fundamental point and implements this specific one-hour, 0.12 ppm standard. Table 1 classifies areas based on the 0.12 ppm measurement and the extent to which the area is measured to be 0.121 ppm or above. CAA §181(a)(1), Table 1; 42 U.S.C. 7511(a)(1), Table 1. All designations are measured from this standard, as are redesignations and reclassifications if an area falls out of attainment or misses an attainment deadline. CAA §181(b)(1), (2); 42 U.S.C. 7511(b)(1), (2).

[2] The "design value is the fourth-highest daily maximum ozone concentration in an area over three consecutive years for which there are sufficient data. If that value is less than or equal to 0.12 ppm, then an area will have only three expected values above that level and it will be in attainment with the ozone NAAQS." 175 F.3d at 1046 n. 6; Pet. App. at 32a n.6.

Any reading of Section 181 that removes the references to the one-hour, 0.12 ppm standard would result in completely nullifying that section – a result surely not intended by Congress. It provides, in clear and simple terms, that areas are classified, designated, and reclassified according to this one-hour, 0.12 ppm standard. Any other reading simply revokes Table 1 in its entirety.

In fact, the legislative history suggests that Congress considered whether EPA should have the authority to revise the one-hour standard and rejected that approach. The version of Section 181 introduced in H.R. 2323 specifically provided for revised ozone standards:

> If the Administrator revises the national primary ambient air quality standard for ozone after the enactment of this subpart, the Administrator shall, within 6 months after the revision, promulgate requirements applicable to all areas which have not attained that standard as of the date of such revision and shall require revisions in the applicable implementation plans for such areas within 18 months after such revision.

H.R. 2323, 101st Cong., Section 181(e) (1989), as introduced, reprinted in II *1990 Legislative History* at 4060. Although portions of H.R. 2323 would ultimately find their way into the final bill, the House Health and Environment Subcommittee rejected this provision in favor of H.R. 3030.[3]

[3] The final version of the Clean Air Act Amendments of 1990, as reported in H.R. Conf. Rep. No. 101-952 (1990), reprinted in I *1990 Legislative History* at 1451, was an amalgamation of a Senate bill (S. 1630) and two House bills (H.R. 3030 and 2323). The version of S. 1630 that Congress ultimately enacted was virtually identical to H.R. 3030 as passed by the House. *See* House Debate (May 23, 1990), reprinted in II *1990 Legislative History* at 3019.

See House Debate (May 21, 1990), reprinted in II *1990 Legislative History* at 2533. Congress's rejection of this provision supports the conclusion that Congress intended to codify the 0.12 ppm ozone standard as the final bill did not refer to the Administrator's authority to revise the ozone standard established in Subpart 2.

In short, the fundamental building block of Section 181 and, therefore, Subpart 2, is Congress's codification of the one-hour, 0.12 ppm ozone standard. EPA's attempt to change that standard necessarily changes the congressional scheme and, therefore, goes beyond EPA's authority under the Act.

2. EPA's revised standard conflicts with the classifications and attainment dates set by operation of law in Subpart 2.

Congress's sensible response to the failure of the old approach to controlling ozone was to codify the existing standard, classify areas according to how far they were from achieving that standard, and then set specific dates by which these areas, according to their classification, must attain a specific ozone reduction. This cascading approach to ozone attainment not only allowed areas furthest from attainment of the 0.12 ppm standard the most time to achieve the one-hour standard, but it also imposed upon those areas the most stringent requirements to assist getting there. Congress presented the initial framework for this approach in Section 181 of the Act.

Section 181 provides classifications and attainment dates for each area designated nonattainment for ozone, as these designations existed at the time of enactment *and as they may be revised in the future*. CAA §181(a), (b); 42 U.S.C. 7511(a), (b). Section 181 designates these areas "by

operation of law" as Marginal, Moderate, Serious, Severe or Extreme, according to how far they are from meeting the 0.12 ppm standard. *Id.*

Section 181(a)[4] also includes Table 1, which sets out, for each classification (Marginal through Extreme), a date by which to attain a standard of 0.12 ppm. CAA §181(a); 42 U.S.C. 7511(a). For each of these areas, "the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." *Id.* In the case of Severe and Extreme areas, these attainment dates have not yet occurred. *See* Table 1 (for Severe areas, the date is 2005; for Extreme areas, it is 2010).

Congress enacted Subpart 2 precisely because the controls of Subpart 1 had failed to bring areas into attainment with the 0.12 ppm standard. *See* H.R. Rep. No. 101-490 (1990), reprinted in II *1990 Legislative History* at 3169-74. Rather than treating all areas alike, as EPA now proposes, Congress gave areas, depending on their classification, between three and 20 years to attain the one-hour, 0.12 ppm standard. Since Subpart 2 extended the time for nonattainment areas to comply with the one-hour standard, Subpart 2 necessarily precludes EPA from requiring areas to comply either more quickly or with a more stringent ozone standard.

---

[4] In Part II.A. of their brief, Respondents *American Trucking Associations, et al.* (ATA) respond to EPA's argument that the title of Section 181(a) limits the application of Table 1's classifications and dates to those designations based on the one-hour standard and, by a great leap of logic, allows EPA to apply different classifications and attainment dates to designations based on a revised standard. As ATA explains, the reference to "1989 nonattainment areas" is the result of an easily explained oversight and, in any event, does not affect Section 181's interpretation.

Section 172 (in Subpart 1 of the Act) generally requires areas to comply with a primary standard "as expeditiously as practicable, but not later than 5 years from the date such area was designated nonattainment." CAA §172(a)(2)(A); 42 U.S.C. 7502(a)(2)(A). If EPA and the States were to take the full time authorized in Subpart 1 for making attainment designations and EPA were to approve every possible extension for each area, all nonattainment areas would have until 2012 to comply with the new eight-hour, 0.08 ppm standard. CAA §107(d)(1)(A)-(B); 42 U.S.C. 7407(d)(1)(A)-(B); CAA §172(a)(2)(A), (C); 7502(a)(2)(A), (C). "Such wide discretion is inconsistent, however, with Subpart 2, in which Congress stripped EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment." 175 F.3d at 1049; Pet. App. at 40a.

Moreover, Section 181 gives Los Angeles, the nation's only Extreme Area, until 2010 to attain the one-hour, 0.12 ppm ozone standard, and the possibility of extending that deadline to 2012. EPA's response to the concern that Los Angeles would be required to attain the revised standard in accordance with Subpart 1 "no later than the same year that marks the outer time limit for attaining Subpart 2's one-hour ozone standard" is no response at all. EPA Brief at 49. As the court of appeals found, "[t]hat Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2." 175 F.3d at 1049; Pet. App. at 41a.

In short, Congress has spoken directly to the issue whether EPA may impose classifications and attainment dates different from those provided in Subpart 2. EPA's attempt to implement a revised standard and, necessarily, to change the classifications and attainment dates found in Subpart 2 is, therefore, unlawful.

3. EPA's revised standard changes the state planning requirements imposed by Subpart 2.

Congress recognized that attainment was going to be extremely difficult, if not impossible, to achieve in some areas. Accordingly, Congress imposed comprehensive planning requirements upon the States to assure strong incentives and continuing progress, but no absolute deadline for final compliance.

First, Section 181 provides classifications and attainment dates for areas that bump up to a higher classification or change from attainment to nonattainment. CAA §181(b)(2), (4); 42 U.S.C. 7511(b)(2), (4). For example, if a Severe area fails to meet the standard by the attainment date, it will become subject to specified sanctions, including a requirement that the State demonstrate percentage reductions "in each 3-year interval after such failure until the standard is attained." CAA §181(b)(4)(A); 42 U.S.C. 7511(b)(4)(A). And, anticipating the possibility that EPA may modify the method of determining compliance with the national standard before Severe areas come into attainment, Section 181 provides that a design value or other indicator comparable to 0.14 "shall be used" to determine applicable sanctions. CAA §181(b)(4)(D); 42 U.S.C. 7511(b)(4)(D).[5]

Section 182 provides for state implementation plan (SIP) revisions and sets out plan requirements for each classification (Marginal through Extreme). CAA §182; 42 U.S.C. 7511a. The scheme begins with requirements for

---

[5] This use of 0.14 ppm as a measurement for determining whether sanctions would apply is yet another indication that Congress intended for the standard to remain at 0.12 ppm.

Marginal areas, and then adds increasingly more stringent requirements for each additional classification. These plan requirements are comprehensive and create several mechanisms by which Subpart 2 will control ozone attainment for the entire 20-year period. They include mandatory control measures, annual rate of progress requirements for emission reductions, and offset ratios for the emissions from new or modified stationary sources. [6] *Id.*

Section 182 anticipates that these requirements will apply well into the future, with no end date in sight. Some of the measures applicable to Severe and Extreme areas did not take effect for years after 1990 and are triggered at various intervals thereafter. *See, e.g.*, CAA §182(e)(3); 42 U.S.C. 7511a(e)(3) (making clean fuels requirements applicable in 1998); CAA §182(g)(1); 42 U.S.C. 7511a(g)(1) (requiring EPA to determine nitrogen oxide reductions in 1996 and at three-year intervals thereafter).

Indeed, Section 182 obviously anticipates that these requirements will continue to apply, not only during the 20-year period before the final attainment date, but until all areas of the country meet the 0.12 ppm standard. For example, Congress established "reasonable further progress" requirements to ensure that States are, in fact, moving towards their goal. CAA §182; 42 U.S.C. 7511a. *See* Senate Debate (January 23, 1990), reprinted in II *1990 Legislative History* at 4837 (statement of Sen. Chafee)("The milestone provisions of the bill are designed to avoid a repeat of the situation that occurred when we passed the 1977 amendments," which allowed States to go for years without

[6] "Nonattainment areas must reduce pollutants by specified percentage increments from the present until the health standard is achieved. This new requirement will ensure early ozone reductions and, for the first time, steady progress toward meeting the standard." Senate Debate (October 27, 1990), reprinted in I *1990 Legislative History* at 948 (comments of Sen. Chafee).

having to demonstrate progress). In addition, by 1992, States were to have submitted an inventory of actual emissions from all sources. CAA §182(a)(1); 42 U.S.C. 7511a(a)(1). Thereafter, "[n]o later than the end of each 3-year period after submission of the inventory . . . until the area is redesignated to attainment," States must submit revised inventories. CAA §182(a)(3)(A); 42 U.S.C. 7511a(a)(3)(A).

These planning requirements implement Congress's intent to ensure continuous state progress toward meeting a specific standard. In contrast, EPA's rulemaking would return the States to the failed compliance scheme that Congress abandoned in 1990, and it would resurrect the historic dilemma the States had in creating a plan to comply with an unachievable standard by a fixed time. Such a scheme not only conflicts with an important part of Congress's overall scheme, but is destined to be unsuccessful once again.

4. EPA's revised standard conflicts with Congress's overall approach to implementating and meeting a national ozone standard.

As described above, EPA's action conflicts in specific ways with key components of Subpart 2: the standard; the classifications and attainment dates; and the state planning requirements. Viewing Subpart 2 in its entirety, moreover, reveals that EPA's action also conflicts with the overall structure that Congress built – its realistic approach to implementing and meeting a national ozone standard.

This Court instructs that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 120 S.Ct. at 1300. Indeed, it is a "fundamental canon of statutory construction that the words of a statute must be read in their

context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). In addition, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, 120 S.Ct. at 1301.

Considered as a whole, Subpart 2 represents Congress's answer to a policy question of economic and political importance. It is a balance among the competing needs that blended to form a coherent strategy. And it is a comprehensive response to a complex problem. It is not an open-ended invitation for EPA to reconsider and dismantle Congress's approach whenever and however EPA wishes.

The legislative history of the 1990 amendments supports the conclusion that Congress sought a reasonable, realistic approach for reaching countrywide attainment with the 0.12 ppm standard in light of the fact that past efforts had failed. In 1970, Congress set 1975 as the deadline for meeting the ozone standard. Two years after that deadline, 78 areas were still violating the ozone standard then in place (a one-hour, 0.08 ppm standard). S. Rep. 101-228 (1989), reprinted in V *1990 Legislative History* at 8350. Congress extended the deadline by five years, to 1982. Then, in 1982, areas that had still not met the standard were able to get an extension to 1987. *Id.* Yet, even by 1989, many areas had still not met the 1977 standard. *Id.* at 8351.

Faced with this history of missed deadlines and freely-given extensions, Congress was plainly frustrated by the "widespread failure to meet the ambient standards" that it blamed both upon "States . . . and EPA." *Id.* Moreover, it recognized that leaving implementation methods to EPA discretion simply had not worked. "Predicting future air quality based on assumed control programs is a complicated

undertaking that is susceptible to 'paper' demonstrations of attainment that bear little relation to the likelihood of actual attainment." *Id.* As a result, Congress decided to establish both a realistic standard, the one-hour, 0.12 ppm standard, and the means by which to attain that standard.

The new approach was evident as soon as S. 1630 appeared in the Senate: "The nonattainment provisions of the bill are based on more than 17 years of experience in trying to attain healthy air in all areas of the nation. The deadlines in the bill for attainment are *realistic*, with the ozone deadlines being the longest in recognition of the complexity of the ozone pollution problem. The emphasis in the bill, however, is not on the deadlines but on what happens in the period before the deadlines. *The concept of reasonable further progress* . . . is amplified by requiring specific incremental progress over defined periods for each of the pollutants addressed: ozone, carbon monoxide, and particulate matter (PM-10)." *Id.* at 8352 (emphasis supplied).

Despite Congress's approach, EPA argues that it may, at any time and based on its own policy judgments, impose a new ozone standard, new classifications, and a new attainment date. EPA Brief at 44. EPA's 1997 rulemaking applied the new standard only to areas that had already attained the one-hour standard (a power Judge Tatel, in his dissenting opinion on rehearing, agreed that EPA had). However, EPA now argues before this Court that it has the power to change the standard for any area, including those that have not yet attained the standard pursuant to Subpart 2, and at any time.

EPA's 1997 rulemaking will create three categories of areas: (1) those areas that are in compliance with both the one-hour and the eight-hour standard; (2) those areas that were in compliance with the one-hour standard, but are not in

compliance with the new, eight-hour standard; and (3) those areas that are not in compliance with either the one-hour standard or the eight-hour standard. As to all of these areas, no matter where their compliance efforts stand to date, EPA's action conflicts with the overall approach of Subpart 2, *i.e.*, implementation of a scheme with strong incentives to comply, sanctions for failure to comply, and steady progression to final attainment.

The D.C. Circuit's solution (that EPA may revise the standard and designate areas based on that standard, but may not classify areas or set dates different from those in Subpart 2) does not resolve this conflict and creates even more confusion for the States by allowing two different standards to apply in parallel. In fact, the D.C. Circuit's solution ignores altogether the immediate burdens and significant consequences that follow from revision of a standard, and particularly those that follow a nonattainment designation.[7] For Congress's scheme to have meaning, it must preclude even revision of the ozone standard.

Nonetheless, EPA argues, at pages 49-50 of its brief, that "there is no reason to believe that Congress intended to preclude" EPA from enforcing the one-hour ozone standard and a revised ozone standard at the same time. To the contrary, Congress considered, and rejected, this very approach before enacting the 1990 amendments. The proposed Clean Air Standards Attainment Act of 1987 included a new provision, Section 109(f), which would have authorized the Administrator to "promulgate a national

[7] The consequences that flow from EPA's revision of the standard, particularly those that follow a nonattainment designation, are discussed below, at pages 37-38. *See also* Part II.C. of Respondent ATA's Brief (presenting an alternative argument that even if EPA may revise the one-hour standard, EPA may not designate areas as nonattainment based on a revised standard).

primary ambient air quality standard for ozone concentrations averaged over a period not less than six hours or more than twelve hours in length[.]" S. 1894, 100th Cong., Section 402 (1987), as reported, reprinted in VI *1990 Legislative History* at 9390.

The new six- to twelve-hour ozone standard was to be considered as "a second primary ozone standard . . . in addition to the current one-hour standard. . . ." S. Rep. 100-231 (1987), reprinted in VI *1990 Legislative History* at 9611. Senator Simpson pointed out the illogical nature of such an approach:

> Even a casual observer would conclude that an area that cannot meet the current ozone standard is not going to meet a new "more protective" ozone standard. . . . Yet, under this bill an area which is in the ten-year or fifteen-year ozone nonattainment category would have to commit to all the burdensome and onerous provisions of Title I in order to avoid immediate sanctions only to discover three years later that it must meet a new standard. . . .

Id. at 9780-81 (additional views of Sen. Simpson). The Senate Environment and Public Works Committee reported S. 1894 in November, 1987. However, the Senate did not act on it. *See* S. Rep. 101-228 (1989), reprinted in V *1990 Legislative History* at 8344. Moreover, none of the bills introduced in the 101st Congress that led to the 1990 amendments contained such a provision. This is because the 101st Congress took a new, more realistic approach, that is, meeting the then-existing standard as mandated by Subpart 2.

In short, EPA's action to revise the one-hour ozone standard and to implement the eight-hour standard conflicts

with Congress's comprehensive scheme for ozone regulation, both in its component parts and as reflected in the overall structure. EPA's action, therefore, is unlawful.

B. The Act Offers EPA No Authority To Revise The One-Hour Ozone Standard Or To Implement A New Standard.

Despite these direct conflicts with Subpart 2, EPA argues that it has independent authority under the Clean Air Act to revise the one-hour standard and to implement corresponding planning and operational requirements. No such "general" authority overrides the specific requirements and limitations found in Subpart 2, and EPA's arguments to the contrary should be rejected.

1. The Act offers EPA no general authority to designate ozone nonattainment areas, to classify those areas, or to set dates for attainment of a revised ozone standard.

EPA argues that, when enacting Subpart 2 to implement only the existing one-hour ozone standard, Congress left in place Subpart 1 to govern designations and classifications for ozone nonattainment areas and to set new attainment dates, all based on a revised standard. EPA Brief at 45. Specifically, EPA argues that Section 172(a), 42 U.S.C. 7502(a), which generally governs the selection of classifications and attainment dates, gives it authority to classify areas and to set attainment dates based on a revised ozone standard.

Before reaching Section 172, we begin with Section 107, which provides the general requirements for area designations. CAA §107(d)(1); 42 U.S.C. 7407(d)(1).

Responsibility for initial designations, following the promulgation of a new or revised national standard, lies with the States. Section 107 requires each Governor to submit to EPA a list of all areas within the State, designating each area as: nonattainment, if the area does not meet the standard or contributes to nonattainment in another area; attainment, if the area meets the standard; or unclassifiable, if the area cannot be classified based on available information. CAA §107(d)(1)(A); 42 U.S.C. 7407(d)(1)(A). Once the States submit their lists of designations, EPA must then promulgate the designations within 120 days. CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B).

Section 107(d)(4), however, sets out specific requirements for nonattainment designations for ozone. 42 U.S.C. 7407(d)(4). That section requires each Governor, within 120 days after November 15, 1990, to submit a list that designates areas as attainment, nonattainment, or unclassifiable with respect to the national ozone standard. CAA §107(d)(4)(A)(i); 42 U.S.C. 7407(d)(4)(A)(i). Once the Governor submits the list, EPA must promulgate such designations within 120 days. CAA §107(d)(4)(A)(ii); 42 U.S.C. 7407(d)(4)(A)(ii). The section also imposes more stringent requirements for ozone nonattainment areas within consolidated metropolitan statistical areas, changing the boundaries of the nonattainment area to include the entire consolidated metro area. CAA §107(d)(4)(A)(iv); 42 U.S.C. 7407(d)(4)(A)(iv).

Section 172 picks up where Section 107 leaves off. Section 172(a)(1) provides that, on or after the date EPA promulgates the nonattainment designations pursuant to Section 107(d), EPA "may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes." CAA §172(a)(1)(A); 42 U.S.C. 7502(a)(1)(A). Section 172(a)(1)(C) specifically provides, however, that "[t]his paragraph shall not apply with respect

to nonattainment areas for which classifications are specifically provided under other provisions of this part [Part D]." CAA §172(a)(1)(C); 42 U.S.C. 7502(a)(1)(C).

As noted, Section 172(a)(1) provides that EPA may classify an area for the purpose of applying an attainment date under paragraph 2. Paragraph 2, which provides generally for implementation of an attainment date for other pollutants, also states, however, that "[t]his paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part [Part D]." CAA §172(a)(2)(D); 42 U.S.C. 7502(a)(2)(D).

In combination, Section 107 and Section 172 expressly exempt from EPA's general authority the power to designate ozone nonattainment areas (under Section 107) or to classify and set ozone attainment dates (under Section 172). Indeed, Section 107 provides specific instruction to EPA for designation of areas for attainment of ozone and Section 172 provides (in two different paragraphs) an express exception for areas for which nonattainment designations are specifically provided under other provisions of Part D. Subpart 2 of Part D, of course, specifically provides nonattainment designations (for areas not meeting the one-hour, 0.121 ppm standard), classifications (Marginal through Extreme), and attainment dates (1993-2010) for ozone. EPA's attempt to ignore these express limitations and to usurp power not granted to it is unlawful.

2. The Act offers EPA no general authority to revise the one-hour ozone standard.

Section 109 of the Act authorizes EPA, within 30 days after December 31, 1970, to promulgate national primary and secondary ambient air quality standards for the

pollutants for which EPA issued criteria, and simultaneously with any future criteria thereafter. CAA §109(a); 42 U.S.C. 7409(a). Not later than December 31, 1980, and at five-year intervals thereafter, EPA is to "complete a thorough review" of the criteria issued under Section 108, 42 U.S.C. 7408, and the national standards "promulgated under this section" and to "make such revisions in such criteria and standards and promulgate such new standards *as may be appropriate* in accordance with [Section 108] and [Section 109(b)]." *Id.* (emphasis supplied).

Here, in light of EPA's inability to designate ozone nonattainment areas, classify ozone nonattainment areas, or set attainment dates for such areas, it was not "appropriate" for EPA to revise the one-hour ozone standard. In fact, a recent EPA action admits as much. In July of this year, EPA issued a final rule that rescinded the eight-hour standard until it becomes fully enforceable and is no longer subject to legal challenge. 65 Fed. Reg. 45182 (2000). EPA stated that because the D.C. Circuit's decision "raised doubts about the enforceability of the 8-hour standard and EPA's ability to implement the standard fully at this time, the basis for the regulation revoking the applicability of the 1-hour standard in certain areas no longer exists." 65 Fed. Reg. 45185 (2000).

The Respondent States agree that if EPA cannot fully enforce the eight-hour standard, it should not be effective. Even more, if EPA cannot enforce a revised ozone standard, it was not "appropriate" for EPA to even revise the one-hour standard. Instead, EPA should have reviewed the one-hour standard and reported to Congress the need to revise it or change the classifications and attainment dates in Subpart 2.

In its brief, EPA argues that the D.C. Circuit's conclusion that EPA may revise the one-hour standard, but must implement it according to Subpart 2 "would lead to unworkable and absurd results." EPA Brief at 47. Other

briefs in support of EPA's position similarly assert that implementation of a revised standard according to Subpart 2 would work "incomprehensible," "nonsensical," and "bizarre" results. Brief of *Amici Curiae* States at 15; Brief of Respondents Massachusetts and New Jersey at 47-48.

The Respondent States agree. Congress simply did not intend for EPA to implement any ozone standard other than the one-hour, 0.12 ppm standard set by Subpart 2, and any implementation of a different standard is unworkable.

As EPA points out, Section 181(a)(1), 42 U.S.C. 7511(a)(1), sets attainment dates and classifications based on an area's "design value," which is an air quality measure that specifically applies to the one-hour standard that was in existence in 1990. EPA Brief at 47. Again, as EPA points out, it makes no sense "and, indeed, would be impossible" to classify areas and to set their attainment dates for the eight-hour standard using an air quality measurement based on the one-hour standard.

In addition, Section 181 sets attainment dates for areas based on a fixed number of years from 1990. As EPA states, "[t]hat timetable makes no sense in calculating attainment dates" for the eight-hour standard. EPA Brief at 47; Brief of *Amici Curiae* States at 15.

EPA's solution to these awkward and unworkable consequences is to ignore altogether Congress's one-hour standard and corresponding planning and operational requirements. Without a revised standard, Congress's instruction in regard to ozone attainment is not unclear, however; nor is it unworkable. In Section 181, Congress codified the one-hour standard; in Section 107, Congress exempted ozone nonattainment designations from EPA's general authority to designate; and in Section 172, Congress exempted ozone nonattainment classifications and attainment

dates from EPA's general authority to classify areas and to set attainment dates. In the place of EPA's general authority, Congress enacted Subpart 2, a comprehensive and sensible approach to ozone regulation.

These provisions leave no doubt that Congress has affirmatively acted to address ozone regulation. Just as Congress acted to address the issue of tobacco and health (*see FDA v. Brown & Williamson*) and to address the issue of long distance telephone services (*see MCI v. AT&T*), it has created a distinct scheme for implementing a specific ozone standard, to the exclusion of EPA. As a result, just as Congress's action precluded the FDA's regulation of tobacco and the FCC's regulation of long distance carriers, so too does Subpart 2 preclude EPA from revising the one-hour standard or implementing a different standard.

In the final analysis, just as in those prior cases, there is no doubt that the problem EPA seeks to address (the regulation of air quality) is significant. "Nonetheless, no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson*, 120 S.Ct. at 1315 (citations omitted). In order to "effectuate the congressional purpose of protecting the public," EPA "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.* (citations omitted).

In Subpart 2, Congress indicated clearly where congressional purpose would stop – at implementation of the one-hour, 0.12 ppm ozone standard in accordance with Congress's plan. EPA may not, therefore, go further, and its attempt to do so is not "appropriate."

III. EPA'S ACTION TO REVISE THE ONE-HOUR STANDARD AND IMPLEMENT A NEW STANDARD WAS A FINAL AGENCY ACTION RIPE FOR REVIEW.

A. The Court Need Not Address The Questions Of Finality Or Ripeness.

In the court of appeals, the petitioning States and industry groups argued that Subpart 2 codified the one-hour, 0.12 ppm standard and provided the exclusive means for ozone regulation; therefore, EPA could not promulgate a new ozone standard. No party, not even EPA, distinguished "revision of the standard" and "designation" from "enforcement" or "implementation" of that revised standard or nonattainment designation. The court, however, did make that distinction. The court held, first, that EPA may revise the ozone standard and, based on that revised standard, may designate areas as nonattainment, but, second, that EPA may not implement the revised standard or otherwise implement the designation in a way that conflicts with Subpart 2.

In its petition for rehearing before the lower court, EPA argued for the first time, as it argues here, that the ozone rulemaking was not a final action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether the statutory provisions at issue precluded EPA from promulgating the revised standard. EPA's position and the alleged need to address this issue stem from a mischaracterization of the issues before the Court in two important respects.

First, as described above, this case is not simply about *implementation* of a properly-revised rule. Rather, it is about EPA's power to revise the ozone standard at all, *i.e.*, its power to revoke Congress's plan for regulation of ozone and to require States to implement a new and different standard.

Indeed, that is precisely the issue presented and briefed before the court of appeals.

Second, EPA's focus on the preamble and its "explanation" of the rule, as distinguished from the rule itself, suggests that petitioners challenged nothing more than vague statements about uncertain future actions by EPA. But petitioners challenged EPA's entire rulemaking to revise the one-hour ozone standard. That rulemaking included promulgation of 40 C.F.R. 50.9(b), which provides, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 62 Fed. Reg. 38894 (1997). This codification of EPA's implementation of the rulemaking is hardly an undeveloped or unreviewable "explanation" of EPA's intentions.

As EPA concedes, promulgation of an air standard is undoubtedly "agency action" and subject to review under Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1). EPA Brief at 34. Thus, considered as a whole and properly framed, EPA's rulemaking leaves no doubt that the issues before this and the lower court – whether, and to what extent, EPA has authority to change Congress's scheme for ozone regulation — are subject to judicial review. Accordingly, this Court need not address EPA's jurisdictional question (Question 2).

B. Consideration Of Traditional Notions Of Finality And Ripeness Leads Inevitably To The Conclusion That EPA's Rulemaking Was Final Agency Action Ripe For Review.

But even considering these issues in the misdirected way EPA has presented them, it is plain that the court of appeals had jurisdiction to answer the questions raised in this case. EPA argues three points: first, the disputed portions of

the rule are not "agency action" within Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1); second, they are not "final" agency action because they do not mark the consummation of EPA's implementation process; and third, they are not ripe for review because the issues are "too abstract" at this stage and will not be sufficiently complete until EPA actually implements the new standard. EPA Brief at 34-44. EPA's arguments misrepresent the scope of the rulemaking at issue, ignore the plain language of the Act, are unsupported by relevant precedent, and would, if adopted, represent a drastic departure from well-established principles of judicial review. Therefore, if the Court reaches this question, it should affirm the D.C. Circuit's ruling that it had jurisdiction to address these issues.

1. EPA's rulemaking was "agency action" within Section 307 of the Act.

Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . *or any other nationally applicable regulations promulgated, or final action taken*, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1)(emphasis added). This statute broadly includes all nationally applicable regulations and all final action, not just the promulgation of standards.

To overcome Section 307, EPA relies upon the Administrative Procedure Act (APA) definition of an "agency action," 5 U.S.C. 551(13), and court decisions construing this definition to argue that the dispute portions of the final rule are not "agency action." EPA Brief at 36-37. However, even that definition supports the Respondents' position on this issue. As this Court noted in *Federal Trade Comm'n v. Standard Oil*, 449 U.S. 232, 238, n. 7 (1980),

even preliminary agency orders or activities are "agency action" as defined by the APA. Congress intended this phrase to apply very broadly.

> The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 [of the APA] and to assure the complete coverage of every form of agency power, proceeding, action or inaction. In that respect, the term includes the supporting procedures, findings, conclusions, or statements or reason or basis for the action or inaction.

Id., citing S.Doc. No. 248, 79th Cong., 2nd Sess., 255 (1946).

For these reasons, this Court should reject EPA's argument that some portions of the final rule are "agency action" and others are not.

2. The entire rule constitutes "final" agency action that is judicially reviewable.

EPA further contends that the disputed portions of the rule are not "final," even if they are "agency action." It correctly sets forth the two conditions that must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

Contrary to EPA's suggestion, the court of appeals applied this well-established test and correctly determined that EPA's action meets both elements.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38873 (1997)(italics in original). EPA explained that this "final decision" represented a change from its original intent to impose the one-hour standard once it had approved state plans for implementing the new standard. *Id.* EPA codified this decision in 40 C.F.R. 50.9(b), from which the petitions below sought review. That section provides, "The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); 62 Fed. Reg. 38894 (1997).

Second, EPA's promulgation of a revised ozone standard triggered a number of "obligations" and "legal consequences." Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for

all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). If a State does not submit a list, EPA will do so. *Id.* This list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and apply attainment dates, CAA §172(a)(1); 42 U.S.C. 7502(a)(1). After EPA completes these steps, each State must develop and implement a plan (a SIP) for meeting the revised requirements. CAA §172(b); 42 U.S.C. 7502(b). Once a state plan is in place, the standard becomes fully effective and results in operational controls imposed directly on sources (such as manufacturing plants, electric utilities, and automobiles).

The "designation" step of implementation is particularly consequential. For instance, Section 173 of the Act imposes requirements for issuing permits to new sources of air pollution in areas designated as nonattainment. 42 U.S.C. 7503. These "new source review" requirements are far more stringent than the permitting rules that apply in attainment areas. *See, e.g.*, CAA §173(a)(1)(A); 42 U.S.C. 7503(a)(1)(A)(requiring emission reduction offsets from existing sources in the region); CAA §173(a)(2); 42 U.S.C. 7503(a)(2)(requiring new sources to comply with the lowest achievable emission rate); CAA §173(a)(5); 42 U.S.C. 7503(a)(5)(requiring analysis of alternative sites, sizes, production processes, and control techniques demonstrating that the benefits of the new source significantly outweigh the resulting environmental and social costs).

The Act also restricts the receipt of federal funds for activities proposed in nonattainment areas. CAA §176; 42 U.S.C. 7506. For these areas, Section 176 prohibits the use of federal funds, most notably federal highway money, for any project that does not "conform" to a state plan. CAA §176(c); 42 U.S.C. 7506(c). For these purposes, a project does not "conform" if it will produce new air quality

violations, worsen existing violations, or delay timely attainment. *See* 40 C.F.R. 51.390; 40 C.F.R. Part 93, Subpart A ("Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws"). The review process necessary to show conformity is long, complex, and costly and results in obvious and detrimental consequences for States and local governments – consequences that flow directly from a nonattainment designation based on a new national standard.

These events that follow revision of an air standard are not mere predictions of what may occur. Rather, each is a certainty once EPA revises a standard. Given such significant, costly, and certain consequences, EPA's suggestion that its rulemaking does not "create rights or obligations" (EPA Brief at 19-20) must fail.

3. EPA's action is ripe for review.

In determining that EPA's action was ripe for review, the court of appeals applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9; Pet. App. at 79a.

EPA asks that review of implementation issues be deferred so that it may "work through the various implementation provisions in more concrete settings, reconcile conflicts, make policy judgments, and apply its expertise as necessary to resolve ambiguities in the statute." EPA Brief at 43. EPA's codification of its revocation of the

one-hour standard in areas meeting that standard needs no further consideration. As issues of law, they need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Furthermore, the denial of review at this stage would result in serious hardships and legal obligations for the Respondent States. As noted above, EPA's action triggers numerous inevitable requirements under the Clean Air Act. The *certainty* of these requirements forces States and local governments to conduct long term planning, budget sufficient funds, allocate appropriate staff, and spend a portion of the limited governmental resources available for environmental protection – all of which occur once EPA revises the standard. To suggest under these circumstances that EPA's action is "too abstract" for review at this stage is to ignore altogether the realities of EPA rulemaking and the impact upon States and local governments.

Correctly framed, the issues before the Court are whether EPA has the authority to change Congress's scheme for ozone regulation and, if so, how far that authority extends. Given the inevitable consequences of EPA's attempt to usurp such authority, these issues are final and ripe for review.

Indeed, the inevitable consequences flowing from EPA's revision of the ozone standard provide yet another prism through which the full extent of EPA's action can be appreciated. EPA's change to the existing structure was substantial, and the consequences of that change are widespread. For better or worse, however, Congress has spoken clearly and comprehensively to the control of ozone in this country. Congress having spoken, EPA may not abrogate the congressional plan.

CONCLUSION

The EPA rulemaking at issue here changed Congress's scheme for regulation of ozone and, therefore, exceeded Congress's grant of authority to promulgate national air standards. Accordingly, this Court should affirm the decision of the court of appeals on the grounds that EPA was not only without power to implement a revised ozone standard, but it was without power to revise the standard in the first instance. EPA's ozone standard, therefore, should be vacated.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
EDWARD B. FOLEY
State Solicitor
JUDITH L. FRENCH*
ELISE W. PORTER
JAMES G. TASSIE
Assistant Attorneys General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-2872
Counsel for Respondent State of Ohio

*Counsel of Record

[Additional Counsel Listed on Next Page]

MARK J. RUDOLPH
Deputy Chief
Office of Legal Services
West Virginia Division of
Environmental Protection
1356 Hansford Street
Charleston, West Virginia 25301
(304) 558-9160
Counsel for Respondent State of West Virginia

JENNIFER M. GRANHOLM
Attorney General of Michigan
THOMAS CASEY
Solicitor General
ALAN F. HOFFMAN
PAMELA J. STEVENSON
Assistant Attorneys General
Natural Resources Division
300 S. Washington, Suite 315
Lansing, Michigan 48917
(517) 373-7540
Counsel for Respondent State of Michigan

Supreme Court, U.S.
FILED
OCT 5 2000

37

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GARY S. GUZY
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

25 pp

TABLE OF CONTENTS

	Page
I. The court of appeals erroneously applied the nondelegation doctrine	1
A. Section 109 of the Clean Air Act is constitutional under the Court's established nondelegation jurisprudence	2
B. There is no warrant for the Court to amend Section 109	7
C. There is no need for this Court to revise its nondelegation jurisprudence	9
II. The court of appeals lacked jurisdiction to review EPA's preamble statements	11
III. If the Court reaches the question, it should rule that EPA may simultaneously implement the one-hour and eight-hour standards	15

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)	3, 4
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	8
American Lung Ass'n v. *EPA*, 134 F.3d 388 (D.C. Cir. 1998)	8
American Paper Inst. v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)	16
American Petroleum Inst. v. *Costle*, 665 F.2d 1176 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982)	8
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946)	5
American Textile Mfrs. Inst. v. *Donovan*, 452 U.S. 490 (1981)	9

Cases—Continued: Page

American Trucking Ass'ns v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999) 7
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 4
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 4-5, 17
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980) 7
Lichter v. *United States*, 334 U.S. 742 (1948) 5
Loving v. *United States*, 517 U.S. 748 (1996) 4, 10
Mistretta v. *United States*, 488 U.S. 361 (1989) 2, 3, 4, 5, 10
NRDC v. *EPA*:
824 F.2d 1146 (D.C. Cir. 1987) 8
902 F.2d 962 (D.C. Cir. 1990), cert. dismissed, 498 U.S. 1075, cert. denied, 498 U.S. 1082 (1991) 8
Opp Cotton Mills, Inc. v. *Administrator*, 312 U.S. 126 (1941) 2, 3
Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) 4
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 5
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 5
Yakus v. *United States*, 321 U.S. 414 (1944) 2, 3

Statutes and regulations:

Clean Air Act, 42 U.S.C. 7401 *et seq.* 6, 8, 10, 11, 14, 15, 18, 19, 20
Tit. I, 42 U.S.C. 7401 *et seq.*:
§ 107(d), 42 U.S.C. 7407(d) 16
§ 107(d)(1)(A), 42 U.S.C. 7407(d)(1)(A) 19
§ 107(d)(1)(A)(i), 42 U.S.C. 7407(d)(1)(A)(i) 16
§ 107(d)(1)(A)(iii), 42 U.S.C. 7407(d)(1)(A)(iii) 16
§ 107(d)(1)(B), 42 U.S.C. 7407(d)(1)(B) 16, 19
§ 108, 42 U.S.C. 7408 (1994 & Supp. IV 1998) 8
§ 109, 42 U.S.C. 7409 ..... 1-2, 3, 4, 7, 8, 9, 10

Statutes and regulations—Continued: Page

§ 109(b)(1), 42 U.S.C. 7409(b)(1) 2
§ 109(b)(2), 42 U.S.C. 7409(b)(2) 2
§ 109(d), 42 U.S.C. 7409(d) 15
§ 109(d)(1), 42 U.S.C. 7409(d)(1) 15
§§ 171-179, 42 U.S.C. 7501 *et seq.* (Subpt. 1) 16, 17, 18, 19, 20
§ 172, 42 U.S.C. 7502 16
§ 172(a), 42 U.S.C. 7502(a) 18, 19
§ 172(a)(1), 42 U.S.C. 7502(a)(1) 16
§ 172(a)(1)(A), 42 U.S.C. 7502(a)(1)(A) 18, 19
§ 172(a)(1)(C), 42 U.S.C. 7502(a)(1)(C) 18
§ 172(a)(2), 42 U.S.C. 7502(a)(2) 16, 20
§ 172(a)(2)(A), 42 U.S.C. 7502(a)(2)(A) 18
§ 172(a)(2)(D), 42 U.S.C. 7502(a)(2)(D) 18
§ 172(c), 42 U.S.C. 7502(c) 16
§§ 181-185B, 42 U.S.C. 7511 *et seq.* (Subpt. 2) 11, 12, 16, 17, 18, 19, 20
§ 181(a), 42 U.S.C. 7511(a) 16, 18, 19
§ 181(a)(1), 42 U.S.C. 7511(a)(1) 18, 19
Tit. III, 42 U.S.C. 7601 *et seq.*:
§ 307(d)(9), 42 U.S.C. 7607(d)(9) 6, 8
§ 307(d)(9)(A), 42 U.S.C. 7607(d)(9)(A) 6
Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 103, 104 Stat. 2423, 42 U.S.C. 7511-7511f 16
40 C.F.R.:
Section 50.9(b) 13, 14
Section 50.10 14

Miscellaneous:

EPA, *The Benefits and Costs of the Clean Air Act: 1970 to 1990* (Oct. 1997) 11
EPA, *The Benefits and Costs of the Clean Air Act, 1990-2010: Report to Congress* (Nov. 1999) 11
62 Fed. Reg. (1997):
pp. 38,655-38,679 6
pp. 38,859-38,874 6
p. 39,873 17

Miscellaneous—Continued: Page

pp. 38,884-38,885 ..... 12, 15
p. 38,885 17
H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1 (1990) 16
A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97 (1987) 8
R. Stern et al., *Supreme Court Practice* (7th ed. 1993) 10, 12

REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we explain that the court of appeals: (I) erroneously applied the nondelegation doctrine (Pet. Br. 21-34); (II) lacked jurisdiction to review EPA's preamble statements on the scope of its authority to implement a revised ozone NAAQS (*id.* at 34-44); and (III) improperly restricted EPA's authority to implement the revised ozone NAAQS (*id.* at 44-56). In response, American Trucking Associations (ATA) and its supporters rewrite the questions presented, disregard controlling precedent, and ask for affirmance on alternative, but unpersuasive, rationales. We reply by reference to the three core questions that our petition places before this Court.[1]

I. The Court Of Appeals Erroneously Applied The Nondelegation Doctrine

Industry respondents and their amici offer three inconsistent defenses of the court of appeals' judgment: (A) APC argues that the Court should affirm the court of appeals' nondelegation ruling on the ground that *EPA* has not articulated an "intelligible principle" in setting NAAQS (APC Br. 22-35); (B) ATA argues that the Court can avoid the nondelegation issue by reinterpreting Section 109 of the

---

[1] We employ the following abbreviations: Brief for Massachusetts et al. (Mass. Br.); Brief for American Lung Ass'n (ALA Br.); Brief for American Trucking Ass'ns et al. (ATA Br.); Brief for Appalachian Power Co. et al. (APC Br.); Brief for Ohio et al. (Ohio Br.); Amici Brief for California et al. (Calif. Br.); Amici Brief for New York et al. (N.Y. Br.); Amici Brief for Clean Air Trust et al. (CAT Br.), Amicus Brief for United States Public Interest Research Group (USPIRG Br.); Amicus Brief for General Electric Co. (GE Br.); Amici Brief for American Institute of Certified Public Accountants, et al. (AICPA Br.); Amici Brief for Intel Corp. et al. (Intel Br.); Amici Brief for Senator Orrin Hatch et al. (Hatch Br.); Amici Brief for Gary E. Marchant et al. (Marchant Br.); Amici Brief for Institute for Justice et al. (IFJ Br.); Amici Brief for the Manufacturers Alliance/MAPI, Inc. et al. (Mfrs. Br.); Amici Brief for Pacific Legal Foundation et al. (PLF Br.); Amici Brief for the Lincoln Institute for Research and Education et al. (LI Br.).

Clean Air Act (CAA) to require EPA to consider compliance costs in setting NAAQS (ATA Br. 7-25); and (C) diverse amici argue that the Court should revise the nondelegation doctrine to curtail government regulation of all sorts (see, *e.g.*, AICPA Br. 4-5; IFJ Br. 11-13; LI Br. 27-30). Only the first theory defends the court of appeals' reasoning, and none of the theories finds support in this Court's decisions.[2]

A. *Section 109 of the CAA is constitutional under this Court's established nondelegation jurisprudence.* The initial issue before this Court is whether Section 109 of the CAA violates the nondelegation doctrine. This Court has articulated and reaffirmed the basic rule:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946).

Mistretta v. *United States*, 488 U.S. 361, 372-373 (1989); accord, *e.g.*, *Yakus* v. *United States*, 321 U.S. 414, 424-425 (1944); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 144-146 (1941). See Pet. Br. 21-22; Mass. Br. 28-29; ALA Br. 17-18.

The Court's oft-repeated statement resolves the nondelegation issue here. Section 109 of the CAA states that EPA shall set NAAQS at levels that are "requisite" to protect "public health" and "public welfare." 42 U.S.C. 7409(b)(1) and (2). Thus, Congress has clearly delineated "the general

[2] The States of Ohio, Michigan, and West Virginia and a group of electronics industry amici make no attempt to defend the court of appeals' nondelegation ruling. See Ohio Br. 10; Intel Br. 25.

policy" and "the public agency which is to apply it." *Mistretta*, 488 U.S. at 373. In addition, Congress has set out, in extraordinary detail, "the boundaries of this delegated authority" (*ibid.*) by specifying the factors that EPA must consider, a body of experts that it must consult, and a rigorous set of procedures that EPA must follow in setting the NAAQS. See Pet. Br. 23-26; see also Mass. Br. 29-35.[3]

Accordingly, Section 109, by its plain terms, amply satisfies nondelegation requirements. Congress has fulfilled its *legislative* function by making the fundamental policy choice to set NAAQS at a level requisite to protect public health and public welfare.[4] Congress has properly assigned to EPA the *executive* responsibility to determine, based on current scientific knowledge and extensive public input, the specific numerical values.[5] There is, accordingly, no sound basis for asserting that Section 109 is unconstitutional under this Court's established nondelegation jurisprudence.[6]

[3] The nondelegation doctrine does not prevent Congress from directing an agency to make scientific inquiries and to exercise judgment in the face of scientific uncertainty. See, *e.g.*, *Yakus*, 321 U.S. at 425 ("It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework."); accord *Opp Cotton Mills*, 312 U.S. at 146.

[4] See, *e.g.*, *Opp Cotton Mills*, 312 U.S. at 144 ("The adoption of the declared policy of Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitutional sense, of the legislative function.").

[5] See, *e.g.*, *Yakus*, 321 U.S. at 424 (The Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.").

[6] Several amici (*e.g.*, PLF Br. 5-6; GE Br. 6-7) argue that this case is similar to the only two cases in which the Court has invalidated federal legislation on nondelegation grounds. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935) (fair competition provisions of the

APC attempts to avoid the clear import of this Court's decisions by asserting that the nondelegation doctrine imposes constitutional constraints on agency action. Relying on the court of appeals' reasoning, APC argues that *EPA's construction* of Section 109 violates a "weak" form of the nondelegation doctrine because *EPA* has not announced an "intelligible principle" to "guide its exercise of public health risk management judgment." APC Br. 22-23. APC's argument makes a muddle of this Court's nondelegation decisions. The question in a nondelegation challenge is whether *Congress* has conferred legislative power. Thus, the Court has stated that *Congress* must set out an "intelligible principle" in legislation to ensure that *Congress* does not delegate legislative power. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 771 (1996). APC's assertion that EPA must articulate an "intelligible principle" when promulgating NAAQS borrows the Court's words, but places them in a context that distorts their meaning.[7]

National Industrial Recovery Act (NIRA)); *Panama Refining*, *supra* ("hot oil" provisions of the NIRA). Those comparisons are preposterous. In *Schechter*, Congress had delegated rulemaking power to private parties. See *Schechter*, 295 U.S. at 537. See also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating provisions of the Bituminous Coal Conservation Act on similar substantive due process grounds). And in both *Schechter* and *Panama Refining*, "Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7 (emphasis added). See *Schechter*, 295 U.S. at 541; *Panama Refining*, 293 U.S. at 415. Section 109 possesses none of those characteristics and, indeed, illustrates the very type of legislative authorization the Court considered permissible. See *Schechter*, 295 U.S. at 530 (Congress may "perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."); accord *Panama Refining*, 293 U.S. at 421.

[7] If APC disagrees with EPA's construction of Section 109, then it may articulate that issue as a nonconstitutional challenge to an agency's interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984). But APC cannot rationally contend that EPA has itself violated the nondelegation doctrine.

The Court has never suggested that the Constitution requires an agency to announce an "intelligible principle" as a precondition for implementing the underlying statute. To the contrary, the Court has repeatedly emphasized that, so long as Congress has set out an intelligible principle, the agency is entitled to exercise discretion in carrying out the congressional program.[8] In exercising that discretion, the agency may describe the governing principles at the outset, or it may make its determinations on a case-by-case basis.[9] If Congress has not mandated a precise course for the agency, then the agency has discretion in determining how to effectuate congressional intent. See *Chevron*, 467 U.S. at 843. The courts play an important role in ensuring that the agency ultimately complies with statutory directives, see, *e.g.*, *American Power & Light*, 329 U.S. at 105, but the courts carry out that role by applying the congressionally prescribed standards for judicial review of agency action, see, *e.g.*, *id.* at 108-112. See Pet. Br. 26-31.

---

[8] See, *e.g.*, *Mistretta*, 488 U.S. at 378 ("our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy"); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."); accord *American Power & Light*, 329 U.S. at 105; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940).

[9] See *American Power & Light*, 329 U.S. at 106 ("Nor is there any constitutional requirement that the legislative standards be translated [by the agency] into formal and detailed rules of thumb prior to their application to a particular case. If [the] agency wishes to proceed by the more flexible case-by-case method, the Constitution poses no obstacle. All that can be required is that the [agency] conform to the statutory language and policy."); cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978).

At bottom, APC's objection to EPA's actions in this case has nothing to do with separation-of-powers principles. Rather, APC disputes EPA's methodology for setting NAAQS and its specific judgments in selecting the levels for the revised ozone and PM NAAQS. See APC Br. 24-33. Congress has directed, however, that those questions should be resolved under the CAA's standards for judicial review. See CAA § 307(d)(9), 42 U.S.C. 7607(d)(9). The court of appeals failed to resolve those questions under the prescribed statutory standard. That standard requires the court to examine the whole record—which includes EPA's full rationale and the scientific evidence on which it relies—to decide whether EPA's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 7607(d)(9)(A). APC's arguments do not address—and certainly provide no basis for excusing—the court of appeals' fundamental error. See Pet. Br. 30-31.[10]

---

[10] In making their nondelegation claims, the industry respondents distort many specific aspects of EPA's regulatory decision and the record below. Those mischaracterizations are irrelevant to the nondelegation issue, and we do not dwell on them here. We trust that, if the court of appeals conducts a careful review of the agency's actions on remand in accordance with the CAA's requirements, see 42 U.S.C. 7607(d)(9), it will discern that EPA revised the NAAQS based on a comprehensive and reasoned analysis of the significance and reliability of new scientific knowledge about the health and welfare effects of the pollutants at issue. See, *e.g.*, 62 Fed. Reg. 38,655-38,679 (1997) (rationale for the revised PM primary NAAQS); *id.* at 38,859-38,874 (rationale for the revised primary ozone NAAQS); see also PM and Ozone Staff Papers and Criteria Documents (lodged with the Clerk of the Court). Contrary to the industry respondents' repeated claims (*e.g.*, ATA Br. 11; APC Br. 24), EPA has never claimed boundless discretion to set NAAQS. See, *e.g.*, Pet. Br. 28-29 & n.22, 31-34.

The comments of some of supposedly disinterested amici warrant brief mention. The Marchant amici and two members of Congress assert that EPA engages in a "science charade" in which the agency improperly purports to set NAAQS based on science alone, without regard to policy considerations. See Marchant Br. 3-4, 9; Hatch Br. 1. Those amici simply ignore the rulemaking record. For example, EPA prepared a detailed "Policy Assessment of Scientific and Technical Information" in each rulemaking "to evaluate the policy implications of the key studies and scientific information contained in [the Criteria Document]"). See PM Staff Paper, at I-1 (lodged with the Clerk); accord Ozone Staff Paper; see also Pet. Br. 4 (describing Staff Papers). Moreover, although Marchant portrays himself as a disinterested law professor (see Marchant Br. 19), he actually served as one of ATA's primary counsel in the proceedings below. See *ATA* v. *EPA*, 175 F.3d 1027, 1031-1032 (D.C. Cir. 1999). The congressional amici acknowledge that their brief was funded by a private organization called "Citizens for a Sound Economy." Hatch Br. 1 n.1.

B. *There is no warrant for the Court to amend Section 109.* ATA makes little effort to defend the court of appeals' reasoning. Rather, ATA argues that the court of appeals has consistently erred, beginning with its decision in *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980), in holding that Section 109 requires EPA to set NAAQS without regard to compliance costs. ATA Br. 7. ATA asserts that "the nondelegation problem that produced the decision below is readily resolved by rejecting *Lead Industries* and allowing the Administrator to formulate new ozone and PM NAAQS constrained only by the requirement that she overtly and systematically consider all logically relevant factors in setting those standards." *Id.* at 11. ATA's position has three basic flaws.

First and foremost, despite ATA's rhetoric to the contrary (see, *e.g.*, ATA Br. 1-2), there is simply no merit to ATA's construction of Section 109. The statutory text, its historical origins, its underlying policy, and Congress's repeated reaffirmations conclusively establish that Congress has directed EPA to establish NAAQS based solely on consideration of the public health and public welfare effects caused by the presence of criteria pollutants in the ambient air. See, *e.g.*, 99-1426 Fed. Resp. Br. 17-31; 99-1426 Mass. Br. 15-28; 99-1426 ALA Br. 1-25, 29-32; 99-1426 Calif. Br. 5-30; 99-1426 CAT Br. 5-29. EPA and the court of appeals have consistently adhered to that construction of Section 109—

and rejected industry's shopworn arguments that NAAQS should take into account the compliance costs—because it is the only rational construction of the statutory text.[11]

Second, this case does not present a "nondelegation problem" (ATA Br. 11). Congress has satisfied the nondelegation doctrine by providing intelligible principles in the CAA—such as requiring that NAAQS be set, based on the Section 108 "criteria," at levels "requisite" to protect public health and public welfare—that constrain EPA's exercise of discretion. What ATA posits as "nondelegation problems" (*id.* at 15-21) are simply its disagreements with judgments that EPA has made in exercising its statutory discretion. ATA may raise such objections in the rulemaking process, and it may seek judicial review of EPA's final rules on the basis of properly preserved objections under the CAA's "arbitrary or capricious standard." 42 U.S.C. 7607(d)(9). But ATA's objections are not matters of constitutional character. Hence, even if Section 109's plain language were ambiguous, there would be no need to adopt a narrowing construction to avoid confronting a nondelegation problem. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237-239 (1998); see also 99-1426 Fed. Resp. Br. 47-48; 99-1426 USPIRG Br. 5-12.

Third, even if Section 109 were ambiguous and it legitimately presented "nondelegation problems," ATA's proposed construction would exacerbate, rather than ameliorate, those problems. *Lead Industries* and subsequent cases hold that Congress made a policy choice to cabin EPA's discretion by requiring the agency to set NAAQS on the basis of a specific body of information: the latest scientific knowledge on the public health and welfare effects caused by the presence of criteria pollutants in the ambient air. Under ATA's construction, EPA's Administrator would be "constrained only by the requirement that she overtly and systematically consider *all logically relevant factors* in setting those standards." ATA Br. 11 (emphasis added). That construction broadens—rather than constrains—EPA's discretion. See 99-1426 Fed. Resp. Br. 47-49.[12]

C. *There is no need for this Court to revise its nondelegation jurisprudence.* Amici representing diverse special interest groups, ranging from accountants to gun owners, argue that this Court should reformulate its nondelegation jurisprudence in various ways, ranging from subjecting Congress to a "clear statement" requirement (AICPA Br. 4) to ignoring its 20th century decisions altogether (LI Br. 27-30). Those amici implicitly acknowledge that Section 109, which has been in place for 30 years, could be invalidated only if the

---

[11] See Pet. App. 19a-21a; *American Lung Ass'n* v. *EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998); *NRDC* v. *EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), cert. dismissed, 498 U.S. 1075, and cert. denied, 498 U.S. 1082 (1991); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); see also *NRDC* v. *EPA*, 824 F.2d 1146, 1158-1159 (D.C. Cir. 1987) (en banc) (*Vinyl Chloride*); A. Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 102 (1987) ("national primary ambient air quality standards are to be established not in light of what is 'feasible' or 'reasonable' (a formulation that would enable counterbalancing costs to be offset against the benefit of clean air) but rather on the sole basis of what is 'requisite to protect the public health'").

[12] ATA might suggest that EPA's discretion would be constrained if EPA were further required to make decisions on a strict cost-benefit basis, formally weighing all "logically relevant" costs against all "logically relevant" benefits. But that reasoning is flawed in two additional respects. First, as we explain in No. 99-1426, the process of quantifying the nationwide environmental costs and benefits of NAAQS is highly subjective and fraught with uncertainty. 99-1426 Fed. Resp. Br. 45-47. If EPA attempted to set NAAQS on the basis of a strict cost-benefit analysis, it would need to exercise additional discretion in identifying and monetizing projected costs and benefits. That process would simply create new and different controversies. Second, this Court should be particularly reluctant to direct an agency to engage in strict cost-benefit analysis in the absence of clear direction from Congress. "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 510 (1981).

Court radically altered nondelegation principles that have been in place for more than 60 years. See, *e.g.*, Pet. App. 59a-60a (Tatel, J., dissenting).[13]

There is clearly no warrant for doing so, and particularly not here, where Congress has not only carefully specified EPA's responsibilities, but has also carefully monitored EPA's actions.[14] As Massachusetts and New Jersey chronicle in their brief, Congress and the Executive Branch have engaged in a decades-long collaborative effort to protect the public from air pollution, and that collaboration has led to ongoing legislative refinements based on the federal and state experience in formulating and implementing the NAAQS. See Mass. Br. 7-19. The CAA illustrates how "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 517 U.S. at 773. That cooperative effort has produced consistent improvements in air quality and, in turn, unquestioned public health and public welfare benefits. Judged even by the industry respondents' preferred criterion—cost-benefit analysis—the program has been a tremendous success. See

[13] As Judge Tatel noted in dissent, the CAA's grant of authority "is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than 60 years." Pet. App. 97a. See *Loving*, 517 U.S. at 771 (noting that the Court has "upheld, without exception, delegations under standards phrased in sweeping terms"); *Mistretta*, 488 U.S. at 373-374 (collecting a sampling of those cases); see also *id.* at 415-416 (Scalia, J., dissenting). As the amici rightly perceive, the Court cannot invalidate Section 109 without calling into question countless Acts of Congress.

[14] Indeed, to the extent that the amici urge altering the court of appeals' remand order in a manner not presented by the questions on which this Court has granted review, the contentions are not properly before the Court. See R. Stern et al., *Supreme Court Practice* 363 (7th ed. 1993); see also note 17, *infra*.

EPA, *The Benefits and Costs of the Clean Air Act: 1970 to 1990* (Oct. 1997).[15]

II. The Court Of Appeals Lacked Jurisdiction To Review EPA's Preamble Statements

As we explain in our opening brief, the court of appeals erred in dictating how EPA should implement the ozone NAAQS before EPA has taken judicially reviewable agency action—including additional notice and comment rulemaking—to implement that NAAQS. Pet. Br. 34-44. The industry respondents and their supporters fail to provide a defensible justification for the court of appeals' decision to address an issue that was not yet before it. Indeed, only Ohio and APC meaningfully attempt to defend the court's jurisdictional decision, and their arguments highlight why the court of appeals erred.

As Ohio acknowledges, several midwestern States and the industry parties argued below that EPA lacked statutory authority *to revise* the ozone NAAQS because future implementation of a revised NAAQS would conflict with the CAA's Subpart 2 scheme for implementing the existing NAAQS. See Ohio Br. 32-33.[16] EPA had considered that argument and rejected it in the rulemaking. See Pet. Br.

[15] Although many benefits of the CAA cannot be quantified in monetary terms, EPA has estimated that the Act as a whole yielded approximately 22 *trillion* dollars in quantifiable benefits between 1970 and 1990, compared to direct compliance costs of approximately 0.5 trillion dollars over the same period. See EPA, *supra*, at ES-8 (summarizing results); see also 99-1426 Mass. Br. 12-13. EPA expects that the CAA will continue to produce substantial public health and public welfare benefits in the next decade. See EPA, *The Benefits and Costs of the Clean Air Act, 1990-2010: Report to Congress* 61, 102 (Nov. 1999).

[16] Ohio expressly states that this case "is about EPA's power to revise the ozone standard at all" and "that is precisely the issue presented and briefed before the court of appeals." Ohio Br. 32-33. See also ATA Br. 45 ("the true focus of the implementation debate in the Court of Appeals was squarely on the argument by parties to the ozone rulemaking that Subpart 2 precludes any revision of the ozone NAAQS").

App. 1a-6a (62 Fed. Reg. at 38,884-38,885). The court of appeals correctly affirmed EPA's determination that it had "power to revise" the ozone NAAQS. Pet. App. 34a-37a. The court of appeals' decision has therefore conclusively resolved that matter. See generally Pet. Br. 34-35.[17]

We do not question that the court of appeals was entitled to resolve whether EPA had statutory authority to revise the ozone NAAQS. The problem here is that the court did not stop at that point, but went on to issue an advisory opinion on another important matter that would be the subject of *future* rulemaking—namely, how EPA should *implement* the revised ozone NAAQS in conjunction with the CAA's Subpart 2 scheme for implementing the pre-existing 1-hour ozone NAAQS. See Pet. App. 37a-43a. The court of appeals directed that, when the time comes for EPA to issue rules governing implementation of the revised ozone NAAQS, "EPA must enforce any revised primary ozone NAAQS under Subpart 2 [of Title I of the CAA]." *Id.* at 43a.

The federal parties objected to the court of appeals' *sua sponte* ruling on that matter at the first opportunity by filing a petition for rehearing explaining that EPA had not yet taken any final agency action to implement the revised ozone

[17] In disregard of this Court's procedures, Ohio has resurrected and extensively briefed that issue (as well as others) without filing a cross-petition for writ of certiorari. Ohio Br. 10-31. ATA and APC have also improperly suggested that this Court should reverse the court of appeals' determination on the statutory basis that Ohio puts forward, even though they did not file a cross-petition on the issue. APC Br. 49-50; ATA Br. 25. A cross-petition is necessary because their argument does not provide an alternative ground for affirming any question presented in our petition. Instead, their argument would require the Court to alter the judgment below. If this Court accepted their contention that the CAA's Subpart 2 provisions implicitly prohibit revision of the ozone NAAQS, the Court would be required to invalidate the revised ozone NAAQS outright, rather than to remand the case to the agency to develop an "intelligible principle" for revising the ozone NAAQS. See R. Stern et al., *supra*, at 363 (under "established doctrine, * * * a party must cross-appeal or cross-petition if such party seeks to change the judgment below or any part thereof").

NAAQS. The court of appeals nevertheless justified its decision on the basis that EPA's *preamble statements* describing why it had authority to *revise* the ozone NAAQS constituted final agency action for purposes of determining how EPA should *implement* the ozone NAAQS. Pet. App. 77a-79a. As our opening brief explains, EPA's preamble statements describing the possible content of future rules do not constitute final agency action that is ripe for review—they are not themselves agency actions that affect legal rights. See Pet. Br. 36-44. Ohio suggests no persuasive basis for treating EPA's preamble statements as final agency action. Ohio simply treats the preamble statements as if they were themselves rules. See Ohio Br. 34-39.

APC takes a similar approach. It argues that "EPA's determination of its authority *to revise* the ozone NAAQS is final action." APC Br. 36 (emphasis added). But the issue here is whether EPA has taken final action on how it will "*[e]nforce*" the revised ozone NAAQS. Pet. App. 37a (emphasis added). APC simply conflates what the court of appeals itself treated as two distinct questions, and then confuses the picture still further by mischaracterizing EPA's actions in the ozone rulemaking. According to APC, EPA issued "*a rule* that simultaneously established a more stringent 8-hour ozone NAAQS and made a 1-hour ozone NAAQS and related Subpart 2 program automatically inapplicable to an area once EPA determines that its air quality meets the 1-hour NAAQS. *40 C.F.R. 50.9(b) & 50.10.*" APC Br. 37 (emphasis added). But as the citations following APC's statement make clear, EPA issued two rules, and APC is improperly treating those two distinct rules as one. As we explain in our opening brief, EPA issued 40 C.F.R. 50.9(b) to change the way that the *existing 1-hour ozone NAAQS* would be implemented in the future. Pet. Br. 39 n.26. That rule is final agency action, but it does not implement the revised 8-hour ozone NAAQS. EPA issued a

separate rule promulgating the revised ozone NAAQS, 40 C.F.R. 50.10. That rule is also final agency action, but it likewise does not implement the revised ozone NAAQS. Indeed, if this Court merely examines the text of the two rules, it will discern that neither rule specifies how EPA will enforce the revised ozone NAAQS. See Pet. Br. 39 n.26 (40 C.F.R. 50.9(b)); Pet. App. 104a (40 C.F.R. 50.10).[18]

The tortuous arguments that Ohio and the industry respondents make in defense of the court of appeals' jurisdictional ruling underscore why courts should respect the basic procedural principles that govern judicial review of agency action. The CAA specifies a methodical, step-by-step approach to carry out the complex task of promulgating and implementing NAAQS. That approach provides opportunities for public participation and judicial review at critical stages of the sequential decisionmaking process. See Pet. Br. 3-8; Mass. Br. 3-6. Each of those stages presents complicated scientific and legal questions that deserve careful consideration before proceeding to the next stage of the process. The court in this case leapfrogged over critical steps in the administrative process and prescribed the outcome for future administrative proceedings before the agency has itself

[18] As we note in our opening brief, no party in this case specifically challenged 40 C.F.R. 50.9(b), and the court of appeals did not review that rule. Even if a party had challenged 40 C.F.R. 50.9(b) and the challenge were successful, that could properly have resulted merely in invalidation of *that* rule. It would not have given the court license to prescribe how EPA should implement *the revised ozone NAAQS*, which remains a subject for *future* rulemaking. APC notes that an environmental group challenged 40 C.F.R. 50.9(b) after the time period for seeking review of that rule had run, and the government objected to that challenge on that basis. APC Br. 39-40. Contrary to APC's implication, there is nothing inconsistent in the government's objection. In that case, the environmental group had filed an untimely challenge to 40 C.F.R. 50.9(b), while in this case, the States and industry parties—which filed a timely challenge to the revised ozone NAAQS, 40 C.F.R. 50.10—did not challenge 40 C.F.R. 50.9(b) before the court of appeals.

determined its course through final regulatory action that is ripe for review. The consequences are particularly serious in the case of the CAA, which creates a regulatory program of extraordinary scope and complexity. If a court intervenes prematurely, it improperly injects itself into a policymaking role and increases the likelihood that it will err.

III. If The Court Reaches The Question, It Should Rule That EPA May Simultaneously Implement The One-Hour And Eight-Hour Standards

If this Court decides to reach the question, it should reject the court of appeals' limits on how EPA may enforce the revised ozone NAAQS. We reply by reference to the brief of the amici Intel *et al.*, which provides a defense of the court of appeals' decision on this point that, while mistaken, is more cogent than the others proffered in this case. As Intel points out (Intel Br. 3, 6), every party that addresses the issue agrees that the court of appeals' initial ruling—that "EPA must enforce any revised primary ozone NAAQS under Subpart 2" (Pet. App. 43a)—is untenable and would produce "absurd results." See also Pet. Br. 47-48. Intel posits two alternatives: "either the revised NAAQS cannot be implemented at all *or* implementation of the revised NAAQS must occur under Subpart 1." Intel Br. 4, 11.

The first alternative—which ATA and APC espouse (ATA Br. 25; APC Br. 49-50)—is illogical and precluded by those portions of the court of appeals' judgment that the respondents have not challenged. The court of appeals correctly rejected industry's argument that EPA lacks authority to revise the ozone NAAQS. Pet. App. 34a-37a.[19] No party has

[19] Indeed, the court of appeals' conclusion is compelled by the CAA's plain language. As the court of appeals correctly explained (Pet. App. 34a), Section 109(d) categorically requires EPA periodically to review and revise all of the NAAQS in light of new scientific information, and Section 109(d) makes no exception for the ozone NAAQS. 42 U.S.C. 7409(d)(1). See generally 62 Fed. Reg. at 38,884-38,885 (reproduced at Pet. Br. App.

filed a cross-petition for writ of certiorari on that issue, see note 17, *supra*, and it is therefore beyond dispute that EPA not only has the power, but also the obligation, to revise the ozone NAAQS periodically in light of new scientific information. It is absurd to suggest that Congress would have required that EPA periodically undertake the elaborate process of reviewing and revising the ozone NAAQS, but at the same time prohibited EPA from implementing the revisions.[20] Thus, the first alternative that Intel offers is foreclosed.

1a-6a). The court of appeals also correctly concluded (Pet. App. 36a-37a)—although it did not need to reach the issue—that Section 107(d) authorizes EPA to designate areas as nonattainment for "revised [NAAQS]." 42 U.S.C. 7407(d)(1)(B). ATA's new argument (ATA Br. 39) that EPA must designate areas as "unclassifiable" for the revised ozone standard is not properly before the Court because ATA did not cross-petition on the issue and a ruling in favor of ATA would alter the court of appeals' judgment. It is also plainly inconsistent with the definitions of "nonattainment" and "unclassifiable." 42 U.S.C. 7407(d)(1)(A)(i) and (iii).

[20] See, *e.g.*, *American Paper Inst.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (the Court will not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other."). ATA incorrectly argues, from a rewriting of legislative history, that Congress enacted the 1990 Clean Air Act Amendments—and specifically Subpart 2—to eliminate EPA's authority to implement a revised ozone standard under Subpart 1. See *e.g.*, ATA Br. 36-38. Contrary to ATA's premise, Subpart 1 does not consist of "ghettoized" pre-1990 provisions (ATA Br. 38). Section 172 of newly-created Subpart 1 contains new attainment date and classification authority to implement revised standards, 42 U.S.C. 7502(a)(1) and (2), together with additional new authorities for implementing all NAAQS in all nonattainment areas. See, e.g., 42 U.S.C. 7502(c); H.R. Rep. No. 490, 101st Cong., 2d Sess. Pt. 1, at 223-224 (1990) ("revised section 172(c) establishes requirements for all nonattainment area plans, *including those for ozone* * * * *nonattainment areas*") (emphasis added); see also Pet. Br. 7-8, 44-46. Congress added Subpart 2 to provide *additional provisions*, and a specific attainment date scheme in Section 181(a), for the limited purpose of addressing attainment of the then-existing ozone standards. See Pet. Br. 46-48; see also 42 U.S.C. 7511-7511f ("Subpart 2—Additional Provisions for Ozone Nonattainment Areas").

Intel properly focuses on the second alternative. Intel recognizes that EPA must implement the revised NAAQS under Subpart 1, and the only question, therefore, is *how* EPA should reconcile its responsibility to implement the revised ozone NAAQS under Subpart 1 with the statutory provisions of Subpart 2. The court of appeals' revised opinion addresses the question opaquely, stating that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." Pet. App. 81a. Intel urges, in accordance with Judge Tatel's concurring opinion, that EPA cannot enforce the revised 8-hour ozone NAAQS under Subpart 1 in the areas subject to Subpart 2 until those nonattainment areas have had the opportunity to attain the pre-existing 1-hour NAAQS in accordance with the timetable set out in Subpart 2. See Intel Br. 4, 11. That question, however, presents a matter within EPA's special expertise. See *Chevron*, 467 U.S. at 844-845. EPA maintains that Congress intended the agency to implement and enforce the revised 8-hour ozone NAAQS on a nationwide basis in accordance with the statutory deadlines established under Subpart 1. In EPA's view, those areas that remain subject to Subpart 2 because they have not attained the pre-existing 1-hour NAAQS must continue to work toward achieving that goal, but they must also work toward attaining the stricter 8-hour NAAQS in accordance with the statutory timetable and substantive programs for the revised NAAQS.[21]

Intel argues that EPA should delay implementing the revised ozone NAAQS in the "1989 nonattainment areas" described in Subpart 2 because Congress enacted Subpart 2 as "a detailed and comprehensive framework" for implementing the 1-hour ozone NAAQS that was then in exis-

---

[21] Despite the court of appeals' confusion on the matter (*e.g.*, Pet. App. 79a-81a), EPA has consistently explained its preliminary view that the revised ozone NAAQS should be implemented in accordance with Subpart 1. See 62 Fed. Reg. at 38,873, 38,885.

tence. Intel Br. 12-15. But Congress clearly did not intend that the 1-hour ozone NAAQS would be the final word in protecting the public from ozone hazards. Congress also directed EPA to revise the ozone NAAQS if new scientific information showed that the 1-hour standard did not adequately protect public health and public welfare. See note 19, *supra*. Congress did not explicitly direct EPA to give the "1989 nonattainment areas" special treatment if EPA found it necessary to revise the ozone NAAQS, and a court should not lightly infer that Congress intended to exempt particular areas from a NAAQS that EPA has revised specifically to protect the public from harm. Contrary to Intel's suggestions (Intel Br. 15), simultaneous implementation of the pre-existing 1-hour NAAQS and the revised 8-hour NAAQS would neither conflict with the CAA's "[p]lain [l]anguage" nor "[n]ullify" Subpart 2.

First, as our opening brief explains (Pet. Br. 45-46), there is no statutory basis for delaying implementation of the revised ozone NAAQS in Subpart 2 nonattainment areas. Section 172(a) of the CAA—within Subpart 1 of Part D—authorizes EPA to establish classifications and attainment dates for all areas designated as "nonattainment" for the revised NAAQS. See 42 U.S.C. 7502(a)(1)(A) and (2)(A). Section 172(a) does not apply to nonattainment areas for which classifications and attainment dates are "specifically provided" under other provisions of the CAA. See 42 U.S.C. 7502(a)(1)(C) and (2)(D). But no provisions of the CAA, other than Section 172(a), provide for classifications and attainment dates for areas designated as nonattainment under the revised ozone NAAQS. See Pet. Br. 47-48.[22] EPA

[22] Intel correctly observes that "Section 181(a)(1), Table 1—within Subpart 2 of Part D—'specifically provides' classifications and attainment dates for areas that are not in attainment with the existing one-hour, 0.12 ppm ozone standard." Intel Br. 16-17. See 42 U.S.C. 7511(a)(1). Indeed, Section 181(a)'s caption—"Classification and attainment dates for 1989 nonattainment areas"—makes that point clear. See Pet. Br. 46. But

has accordingly expressed the view that it should implement the revised ozone NAAQS under the implementation schedule that Section 172(a) sets out for "any revised standard." 42 U.S.C. 7502(a)(1)(A).

Second, Intel errs in asserting that simultaneous implementation of the pre-existing and revised ozone NAAQS would "so undermine the purposes of Subpart 2 as to render Subpart 2 a nullity." Intel Br. 18. Three of Subpart 2's five compliance deadlines have already passed, and only a small number of areas are entitled to additional time for compliance with the pre-existing 1-hour standard. See CAA § 181(a)(1), 42 U.S.C. 7511(a)(1) (Table 1). Those areas, which have the most serious ozone nonattainment problems, will continue to have additional time to comply with the 1-hour standard. But there is no clear basis for inferring that, when Congress gave those areas of the country additional time to comply with that standard, it implicitly intended that EPA alter the statutory timetable set out in Subpart 1 for complying with a revised ozone NAAQS. The CAA creates *national* ambient air quality standards, and, in the absence of clear instruction from Congress, EPA can properly conclude that Congress wished to extend the benefits of any revised ozone NAAQS to the Nation's entire population—including persons residing in areas with the most serious ozone problems. Any intention by Congress to except certain areas from the generally applicable attainment deadlines is, at most, ambiguous. Subpart 2 certainly does not

Section 181(a) does not provide classifications and attainment dates *for areas designated nonattainment under the revised ozone NAAQS*. See Pet. Br. 46; Mass. Br. 45-46. See also 42 U.S.C. 7407(d)(1)(A) and (B) (indicating that area designations are established by reference to particular standards). Indeed, Section 181(a), which predated the revised ozone NAAQS by seven years, could not provide classifications and attainment dates for an ozone NAAQS that had not yet been promulgated. See Pet. Br. 47-48; see also Mass. Br. 46-47; ALA Br. 38-44.

categorically require EPA to delay implementation of the revised ozone NAAQS in any area.[23]

Accordingly, if this Court concludes to reach the issue that the court of appeals addressed prematurely, then it should adhere to the timetable set out in Subpart 1 and to the CAA's explicit policy that all NAAQS are to be attained "as expeditiously as practicable." See CAA § 172(a)(2), 42 U.S.C. 7502(a)(2).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

GARY S. GUZY
General Counsel
Environmental Protection Agency

OCTOBER 2000

---

[23] Intel speculates that, if EPA implements the revised ozone NAAQS in the "1989 nonattainment areas," that action would impose economic hardships on those areas. Intel Br. 19-24. But this Court is in no position to determine, on the record before it, whether those assertions are true or how much additional time particular areas might need to comply with the revised ozone NAAQS. Indeed, it is significant that most of the States that will face those supposed hardships, including New Jersey, California, Maryland, New York, and Pennsylvania, do not agree with Intel's construction. See Mass. Br. 43-50; N.Y. Br. 14-21. Furthermore, Intel's extra-record speculations on the question of hardship raise additional extra-record issues—for example, to what extent delaying implementation would subject sensitive populations, including children and asthmatics, to increased health risks. Intel's extra-record arguments simply underscore our point that the court of appeals has prematurely addressed the question of how EPA should reconcile its duties under Subpart 1 and Subpart 2 before EPA has taken any final agency action that properly places the issue before a reviewing court.

(39)

No. 99-1257

Supreme Court U.S.
FILED
OCT - 5 2000
CLERK

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*;

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF RESPONDENT AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITIONERS

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for American Lung Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27pp

RULE 29.6 DISCLOSURE

American Lung Association (ALA) adopts the Rule 29.6 disclosure set forth in ALA's opening brief at ii.

TABLE OF CONTENTS

Page

I. THE CLEAN AIR ACT COMPLIES WITH THE NONDELEGATION DOCTRINE..... 1

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy this Court's Nondelegation Precedent, Which Does Not Require a "Determinate Criterion." 1

B. Because the Clean Air Act Is Undisputedly Constitutional, There Was No Basis for the D.C. Circuit to Undertake a Constitutionally Based Examination of EPA's Interpretation, Much Less to Require a Constitutionally Based Narrowing of That Interpretation.... 7

C. Nonconstitutional Remedies Are Available to Challenge Any Alleged Failure by EPA to Follow Congressional Mandates or to Engage in Reasoned Decisionmaking..... 8

II. THE D.C. CIRCUIT ERRED IN LIMITING EPA'S AUTHORITY TO IMPLEMENT A NEW OZONE NAAQS 12

A. EPA Has Authority Under Subpart 1 to Implement a More Protective Ozone NAAQS..... 12

Classifications and attainment dates – areas with design value ≥0.121..... 12

Classifications and attainment dates – areas with design value <0.121..... 14

Control Measures..... 15

Designation of nonattainment areas 16

TABLE OF CONTENTS – Continued

Page

B. The 1990 Amendments Left Unchanged EPA's Pre-existing Authority to Promulgate Revised NAAQS..... 17

C. The Structure of the Act's NAAQS Revision and Implementation Provisions Offers No Basis for Overriding the Statute's Express Language 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

American Lung Association v. Browner, 134 F.3d 388 (D.C. Cir. 1998) 9

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) 6

Bowsher v. Synar, 478 U.S. 714 (1986) 5

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 8

Clinton v. New York, 524 U.S. 417 (1998) 5

FEA v. Algonquin SNG, 426 U.S. 548 (1976) 7

Greene v. McElroy, 360 U.S. 474 (1959) 6

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 6

Heckler v. Chaney, 470 U.S. 821 (1985) 8

INS v. Chadha, 462 U.S. 919 (1983) 5

Kent v. Dulles, 357 U.S. 116 (1958) 6

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) 5

Mistretta v. United States, 488 U.S 361 (1989) 8

Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989) 5

Yakus v. United States, 321 U.S. 414 (1944) 5

Zemel v. Rusk, 381 U.S. 1 (1965) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Clean Air Act, § 107, 42 U.S.C. § 7407 16

Clean Air Act, § 109, 42 U.S.C. § 7409 ... 6, 7, 9, 17, 18

Clean Air Act, § 172, 42 U.S.C. § 7502 ... 14, 15, 17, 18

Clean Air Act, § 181, 42 U.S.C. § 7511 ... 12, 13, 14, 15, 16

Clean Air Act, § 182, 42 U.S.C. § 7511a 16

Clean Air Act, § 307, 42 U.S.C. § 7607 ..... 8, 9

LEGISLATIVE HISTORY

116 Cong. Rec. 32900 (September 21, 1970) 2

116 Cong. Rec. 42519 (December 18, 1970) 3

S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) 4

S. Rep. No. 228, 101st Cong., 1st Sess. (1989) 17

FEDERAL REGISTER

62 Fed. Reg. 38652 (July 18, 1997) 11

62 Fed. Reg. 38856 (July 18, 1997) 4, 10, 11

GLOSSARY

ALA	American Lung Association
APC	Appalachian Power Company
ATA	American Trucking Associations
CD	Criteria Document (ozone)
CDPM	Criteria Document (particulate matter)
EPA	Environmental Protection Agency
JAO	Joint Appendix in D.C. Cir. No. 97-1441 (Ozone NAAQS)
JAPM	Joint Appendix in D.C. Cir. No. 97-1440 (Particulate Matter NAAQS)
NAAQS	National Ambient Air Quality Standard(s)
O3	ozone
PM	particulate matter
ppm	parts per million
RTCPM	Response to Comments (particulate matter)

I. THE CLEAN AIR ACT COMPLIES WITH THE NONDELEGATION DOCTRINE.

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy this Court's Nondelegation Precedent, Which Does Not Require a "Determinate Criterion."

The core of the D.C. Circuit's nondelegation ruling is the assertion that a delegation must be limited by a "determinate criterion for drawing lines" in order to pass constitutional muster. App. 6a.[1] Remarkably, in nearly 500 pages of briefing, industry and its allies fail to cite even one decision of this Court that supports this central assertion. In contrast to this telling silence, American Lung Association (ALA) and others have cited numerous decisions in which this Court not only upheld highly nondeterminate delegations, but expressly *defended* their nondeterminacy against nondelegation attack. *See, e.g.*, ALA Br. 28-29.[2] And indeed industry itself has retreated from the "determinate criterion" test, arguing that the nondelegation doctrine does not require "a *rule* that defines precise outcomes in all circumstances," but instead "a *standard* against which an agency's exercise of discretion may be tested." ATA Br. 16-17 (emphasis in original).

This is a test that the Clean Air Act NAAQS provisions easily meet. It is simply unsustainable to concede that open-ended standards such as "[r]easonableness,

---

[1] Appendix citations refer to the appendix filed by the Environmental Protection Agency with its petition for certiorari.

[2] References to briefs are to those in No. 99-1257 unless otherwise expressly indicated.

fairness, justice, equity, and the public interest are *not* lawless standards," Hatch Br. 13 n.9 (emphasis added), while asserting that the far more specific congressional guidance governing NAAQS-setting fails to provide intelligible principles. *See* ALA Br. 18-22; Mass/NJ Br. 12-19.

Industry claims that nondeterminacy is of special concern here, because NAAQS "affect the whole economy," and could theoretically be set at zero. ATA Br. 9-10, 10-11. Industry does not believe its own argument, however, because it vigorously advocates – as an alleged *solution* to the supposed nondelegation problem – an interpretation of the Act that is far *less* determinate than EPA's: specifically, the open-ended assertion that NAAQS must not be based solely on health effects of air pollutants, but must encompass weighing of the "pros and cons," including cost and any other factors which someone might deem *"logically* relevant." *Id.* 22-23, 11 (emphasis added). *See* ALA 99-1426 Br. 40 (quoting ATA), 43-44; Assn. of Amer. Physicians & Surgeons Br. 26.

This interpretation would not in any way reduce the breadth of the applicability of NAAQS: under industry's interpretation, as under EPA's, NAAQS would be *national* standards that potentially have widespread implications for the economy. Moreover, far from preventing EPA from setting stringent NAAQS (even at zero), industry's interpretation would *expand* the opportunities for EPA to do so – either by assigning very high monetary values to benefits (such as human life and health) whose quantification necessarily involves policy judgment, or by invoking nonquantifiable factors such as distributional equity, moral or ethical concerns, or a right to breathe clean air. AEI-Brookings 99-1426 Br. 10; ALA 99-1426 Br. 36-37; 116 Cong. Rec. 32903/2 (1970) (Senator Muskie: "it is time to

write . . . into law" the policy that "all citizens have an inherent *right* to the enjoyment of pure and uncontaminated air") (emphasis added); *id.* 42521/3 (Congressman Hechler); United States Public Interest Research Group Education Fund (USPIRGEF) 99-1426 Br. 24-26. And of course, industry's interpretation would also expand the opportunities for EPA to promulgate *less* stringent NAAQS. ALA 99-1426 Br. 34. By proffering this open-ended, nondeterminate reading as the *only* constitutionally permissible construction of the Act, ATA Br. 11, industry is not only issuing a *Lochner*-esque invitation for the Court to enshrine industry's preferred regulatory policy approach in the Constitution, USPIRGEF 99-1426 Br. 26-30 – it is also conceding the bankruptcy of the proposition that nondeterminacy is *unconstitutional*.

Under a proper reading of the Act, EPA's attention is far more narrowly focused, addressing the protection of human health from air pollutants. While industry and its allies claim that a health-only approach cannot be implemented for "non-threshold" pollutants, that argument is a makeweight, as demonstrated by ATA's claim that *even if there were an effects threshold*, the nondelegation doctrine would still be violated unless EPA "found that *no* health risks exist below that level." ATA Br. 18 (emphasis added). In any event, ALA and others have already shown that if standards are based on adverse effects documented by scientific evidence (and on margins of safety), they need not be set at zero or background levels even for nonthreshold pollutants. ALA 99-1426 Br. 42-43; Mass/NJ 99-1426 Br. 41-43.

To be sure, it is impossible to reduce the setting of a NAAQS – especially a margin of safety – to a determinate

formula: in particular, one of the key purposes of a margin of safety is to account for scientific *uncertainty*. S. Rep. 1196, 91st Cong., 2d Sess. 10 (1970); Mass/NJ Br. 15-17. The D.C. Circuit's demand for a *quantification* of uncertainty – for a "principle [that] reveals how much uncertainty is too much" (App. 10a) – is simply impossible to satisfy. By their nature, scientific uncertainties include important qualitative elements that cannot be precisely calculated based on current scientific information – such as gauging the health significance of certain observed biological effects (*see, e.g.*, 62 Fed. Reg. 38868/1-2 ¶ 5, JAO 13) and assigning safety factors for sensitive populations such as children. Thus, Congress necessarily entrusted to EPA the duty – subject to normal requirements of reasoned decisionmaking – to make judgments concerning how such uncertainties should be factored into standard-setting. Contrary to ATA's suggestion (ATA Br. 18), the Constitution does not require Congress to avoid such agency judgments by mandating a zero-risk policy.

While NAAQS do have implications for the economy, ATA Br. 9, far broader multi-industry delegations have been upheld by this Court. App 60a; ALA Br. 31-32. Indeed, unlike the agency actions authorized by the statutory provisions upheld in those cases, NAAQS do not directly regulate industry, but rather are narrowly addressed to specifying pollution concentrations sufficient to protect health. The implications for industry become concrete only through subsequent implementation actions by the states or (if the states fall short) by EPA. These implementation actions take years, and offer ample opportunity for Congress to intervene and make adjustments to avoid excessive socioeconomic effects – as

it has done repeatedly in the past. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989) (rejecting nondelegation challenge: "Congress . . . can modify [agency] . . . rulings it considers improper") (citation omitted).

Industry's attempts to distinguish this Court's nondelegation precedent are unavailing. In particular, that precedent offers no support for the notion (ATA Br. 12-13) that more specificity is required for delegations with "general and prospective effect" or for those involving setting of numeric values. *See, e.g., Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (approving authority to set "fair and equitable" prices). Likewise, this Court's precedent approving broad delegations involving balancing of competing considerations (ATA Br. 13-14) supports rather than undermines the validity of the Clean Air Act's far narrower NAAQS provisions, where Congress did the balancing and directed EPA to set standards based on health. Finally, industry irrelevantly cites cases that were not even decided under the constitutional "intelligible principle" test, but instead involved other kinds of separation of powers arguments[3] or claims that government

---

[3] *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 736 n.10 (1986) (striking down statute that assigned executive functions to an official subject to removal only by Congress; nondelegation doctrine distinguished); *INS v. Chadha*, 462 U.S. 919, 952 n.16 (1983) (striking down statute that authorized congressional veto; nondelegation doctrine distinguished); *Clinton v. New York*, 524 U.S. 417 (1998) (striking down statute that authorized Presidential line item veto); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (striking down statute that authorized board of review consisting of nine members of Congress).

action impinged on constitutionally protected liberties[4] – or were decided on nonconstitutional grounds.[5]

In short, the key point remains: industry has failed to cite a single decision of this Court supporting the D.C. Circuit's assertion (App. 6a) that the constitutional nondelegation doctrine requires a "determinate criterion for drawing lines." Indeed, recognizing that the Court's nondelegation precedent offers no basis for overturning the carefully circumscribed delegation at issue here, some allies of industry *attack* that precedent and urge the Court to abandon it. *See, e.g.*, Inst. Justice/Cato Br. 11-13. ALA respectfully submits that these arguments are misguided: if industry and its allies believe that the Clean Air Act's mandate should be changed, they should seek such change from the democratically elected Congress, not the unelected judiciary.

---

[4] *See, e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Kent v. Dulles*, 357 U.S. 116 (1958); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Greene v. McElroy*, 360 U.S. 474 (1959). The "void for vagueness" cases (see Mfrs. Alliance Br. 10) likewise involve protection of individuals' liberty and property interests against liability, and are irrelevant for another reason as well: § 109 imposes *neither* civil *nor* criminal liability on the regulated community, but rather directs *EPA* to promulgate regulations.

[5] *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) ("*the Act* requires the FCC to apply *some* limiting standard") (first emphasis added).

B. Because the Clean Air Act Is Undisputedly Constitutional, There Was No Basis for the D.C. Circuit to Undertake a Constitutionally Based Examination of EPA's Interpretation, Much Less to Require a Constitutionally Based Narrowing of That Interpretation.

The foregoing discussion demonstrates the error in the D.C. Circuit's requirement that EPA adopt a narrowing construction of the Act. Like the statute at issue in *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976), the Clean Air Act's NAAQS provisions are "clearly sufficient to meet any delegation doctrine attack." *Accord*, ATA Rsp. to Cert. Petitions at 15 (§ 109 is "undisputedly" constitutional). Accordingly, just as the Court rejected the request for a narrowing construction there, it should do the same here. *See also* USPIRGEF 99-1426 Br. Pt. II.

Moreover, industry has failed to cite a single decision of this Court supporting the D.C. Circuit's ruling – characterized by one of industry's own allies as "novel" and "unprecedented" (Mercatus Br. 13) – that *Congress's* constitutionally conferred legislative power can be protected by requiring an *Executive Branch agency* to enunciate an intelligible principle. As another of industry's allies notes, if the Act's NAAQS provisions set forth an intelligible principle to guide EPA, then the agency's alleged "failure to articulate that principle, while legally troubling on other grounds," would "*not* implicate the nondelegation doctrine." Inst. Justice/Cato Br. 29 (emphasis added). *See also* Hatch Br. 30 n.22.

Finally, the specific interpretation requested by industry – that EPA must balance health against cost and other factors – would *broaden* the Act's mandate (*see* pp.

2-3, *supra*), and thus does not constitute a "narrow" construction within the meaning of *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). ALA 99-1426 Br. 40. And because industry's interpretation is contrary to clear congressional intent, *id.* 29-32, its adoption would constitute, not a "construction" of the Act at all, but a congressionally unauthorized *amendment*. *See* USPIRGEF 99-1426 Br. 11.

C. Nonconstitutional Remedies Are Available to Challenge Any Alleged Failure by EPA to Follow Congressional Mandates or to Engage in Reasoned Decisionmaking.

Industry's true objections to EPA's NAAQS are statutory, not constitutional. The assertion that EPA has taken actions "incompatible with the scope of authority delegated . . . by Congress" (APC Br. 2; *see also id.* 32) is reviewable as a claim that EPA has acted "not in accordance with law." CAA § 307(d)(9)(A). *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (setting forth a two-step process for reviewing such claims). The contention that EPA has failed to "explain the statutory standard that guides [its] . . . exercise of rulemaking discretion and how consideration of relevant science is applied in reference to that standard" (APC Br. 29) is reviewable as a claim that the agency acted in an "arbitrary" and "capricious" manner. CAA § 307(d)(9)(A). Indeed, Appalachian Power concedes that "the Clean Air Act unquestionably provides law to apply," APC Br. 28 – from which it necessarily follows that the Act provides a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Thus, the Act offers

an intelligible principle sufficient to permit judicial review, and the D.C. Circuit's recourse to the constitutional nondelegation doctrine – instead of to normal nonconstitutional review – was error.[6]

Arguing the contrary, Appalachian Power unpersuasively suggests that, although "there are several ways the lower court could have reached the same result" (including constitutional nondelegation review as well as nonconstitutional arbitrary-and-capricious or statutory interpretation review), "[w]hichever basis for decision one chooses, the essential principle is the same: an agency must explain what it does in light of Congress' delegation of authority." APC Br. 23. In short, Appalachian Power is asserting that the D.C. Circuit had the choice between deciding this case on constitutional and nonconstitutional grounds, and chose the *constitutional* ground. This approach stands the doctrine of constitutional avoidance on its head.

Moreover, Appalachian Power's attempt to equate the D.C. Circuit's nondelegation ruling with garden variety nonconstitutional judicial review is refuted by the

---

[6] The argument that EPA failed to provide sufficient protection against health effects (Hatch Br. 29) is not a constitutional argument, but rather a nonconstitutional administrative law challenge under CAA § 307(d)(9)(A). *See, e.g., American Lung Association v. EPA*, 134 F.3d 388 (D.C. Cir. 1998) (responding to plaintiffs' arguments that EPA had failed to provide sufficient health protection, court reviewed and remanded an EPA decision under § 109(b)(1)); Cross-petition of Citizens for Balanced Transportation at 8-12 (arguing that the 1997 PM NAAQS is insufficiently health-protective, but emphasizing that that claim is a *nonconstitutional* claim that raises no nondelegation issues).

D.C. Circuit itself. That court "agree[d]" with circuit precedent holding that, "when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the 'policy judgment' to set the standards at one point within the relevant range rather than another." App. 12a. But the court shunted that precedent aside, asserting that "none of those panels addressed *the claim of undue delegation* that we face here." *Id.* (emphasis added). Thus, the D.C. Circuit clearly believed that its invocation of the constitutionally based nondelegation doctrine made possible a ruling that the court would not have been able to issue on nonconstitutional grounds. *See* App. 96a (Silberman, J., dissenting).

The conclusion that the D.C. Circuit's constitutional ruling was error fully disposes of EPA's Question #1, and the Court need not and should not address industry's nonconstitutional judicial review arguments. While these arguments are not before the Court, ALA offers a few brief observations in response to industry's attacks on the evidence underlying the NAAQS. First, industry's assertion that EPA did not rely on the adverse nature of health effects occurring at pollution levels allowed by the prior NAAQS (APC Br. 6) is simply wrong: EPA made express findings of adverseness for both PM and ozone. 62 Fed. Reg. 38657/1 (1997), JAPM 7; 62 Fed. Reg. 38864/1-2 (1997), JAO 9.

Moreover, the assertion that these effects are not "demonstrated" by the scientific evidence (APC Br. 6) is equally mistaken. For PM, the Criteria Document expressly noted "recent studies providing evidence that serious health effects (mortality, exacerbation of chronic

disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current [i.e., pre-1997] U.S. PM standards.*" CDPM 13-1, JA 1779 (emphasis added). *See also* 62 Fed. Reg. 38665/2, JAPM 15 (evidence that pre-existing NAAQS do not adequately protect health is "strong"). Contrary to industry's assertions (ATA Br. 21; APC Br. 12 n.27), EPA did not rely solely on the statistical significance of these studies, but also concluded on the basis of extensive analysis that the observed effects were unlikely to have been caused by other factors (such as other pollutants), *see, e.g.*, PMSP V-55 to 56, JAPM 2012-14; RTCPM A-22, JAPM 344; CDPM 13-57, JAPM 1835; 62 Fed. Reg. 38660-61, JPM 10-11, and that the consistency and strength of the statistical association was substantial enough to support a finding of causation. RTCPM 68, A22-23, JAPM 295, 344-45; 62 Fed. Reg. 38658-59, JAPM 8-9.

For ozone, EPA examined human clinical studies – studies that "relate known O3 exposures directly to responses in individuals," 62 Fed. Reg. 38872/1, JAO 17 – and concluded that these studies provide "clear evidence" of health effects (including adverse effects) at ozone levels allowed by the prior NAAQS. *Id.* 38863-64, JAO 8-9. Likewise, epidemiological studies provided "strong evidence" of adverse effects at ozone concentrations below the prior NAAQS. CDO 7-171, JAO 1624.

For both PM and ozone, this compelling evidence is more than sufficient demonstration of adverse health

effects, especially in light of the Act's precautionary mandate. See ALA Br. 20-21; App. 54a-56a.[7]

II. THE D.C. CIRCUIT ERRED IN LIMITING EPA'S AUTHORITY TO IMPLEMENT A NEW OZONE NAAQS.

A. EPA Has Authority Under Subpart 1 to Implement a More Protective Ozone NAAQS.

Though conceding that EPA has authority to promulgate a more protective ozone NAAQS, ATA Br. 39, ATA erroneously claims that EPA lacks authority to implement it. *Id.* 29.

Classifications and attainment dates – areas with design value ≥0.121. The core of the D.C. Circuit's ruling (as modified on rehearing) is that Subpart 2 sets forth classifications and attainment dates *under the 1997 ozone NAAQS* for areas with design value ≥0.121. ATA argues that this ruling means that the 1997 NAAQS cannot be implemented at all for areas with design value ≥0.121. ATA Br. 29 (the Act precludes implementation "in any fashion" of a more stringent ozone NAAQS). To the contrary: if Subpart 2 sets forth classifications and attainment dates for such areas under the 1997 NAAQS, the third sentence of § 181(a)(1) would clearly require that the "primary standard attainment date for ozone" be the

[7] EPA's statement that the *risk assessments* do not constitute demonstrated effects (APC Br. 6 n.6) does not purport to address the evidence documenting adverse effects at PM and ozone concentrations below the prior NAAQS – but rather, characterizes EPA's attempts to predict *how often individuals would come into contact* with such concentrations. Such assessments are not a required component of NAAQS-setting. ALA 99-1426 Br. 49-50.

appropriate date specified in § 181(a)(1)'s Table 1. For many areas, the Table 1 dates had already expired as of the July 1997 promulgation date of the new NAAQS. ALA Br. 40-41, 45.

ATA cannot have it both ways: if the first sentence of § 181(a)(1) is to be read broadly to encompass all ozone nonattainment areas, and not just those under the 1979 NAAQS, then the third sentence of that provision must be given a similarly broad reading consistent with its unqualified scope. Instead, ATA's interpretation treats that sentence's unqualified reference to "the primary standard attainment date *for ozone*" as a scrivener's error – and amends it to read "the primary standard attainment date *for the 1979 ozone NAAQS.*"

In short, the hybrid approach advocated by ATA (that the first sentence of 181(a)(1) applies broadly to any ozone NAAQS, but the third sentence applies only to the 1979 NAAQS) is not an available reading of the statutory text. Instead, this case presents two choices for areas with design value ≥0.121: either (1) Subpart 2 specifies classifications and attainment dates under the 1997 NAAQS, and those attainment dates for many areas had already expired when the NAAQS was promulgated in July 1997 (*i.e., both* the first sentence *and* the third sentence of § 181(a)(1) apply to the 1997 NAAQS), or (2) Subpart 2 specifies no classifications or attainment dates for the 1997 NAAQS (*i.e., neither* the first sentence *nor* the third sentence of § 181(a)(1) applies to the 1997 NAAQS). Because interpretation #(1) "makes no sense" (Ohio Br. 30) (citation omitted) and is "absurd" (Intel Br. 9), interpretation #(2) is the only plausible reading of the Act. Thus, because Subpart 2 specifies no classifications or attainment dates under the 1997 NAAQS for areas with

design value ≥0.121, the ouster clauses of § 172(a)(1)(C) and (a)(2)(D) do not apply, and the Subpart 1 classification and attainment date provisions govern.

Classifications and attainment dates – areas with design value <0.121. ATA likewise argues that the 1997 ozone NAAQS cannot be implemented at all for areas with design value less than 0.121. ATA Br. 28-29. *But see* App. 89a (Tatel, J., concurring). Once again, ATA's reading ignores the plain language of the statute. If the first sentence of § 181(a)(1) is read to encompass areas designated nonattainment under the 1997 NAAQS, that same sentence would expressly provide that "*[e]ach*" such area "*shall* be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area, based on the design value for the area." (Emphasis added.) But by ATA's own admission, such classification is *impossible* for areas with design value <0.121, because Table 1 establishes classifications (and attainment dates) "*only* for areas with ozone levels *above* 0.12 parts per million ("ppm") – the level of the 1979 ozone NAAQS." ATA Br. 28 (second emphasis added). ATA's reading, by assigning to § 181(a)(1) nonattainment areas that cannot be classified under Table 1, would treat as a scrivener's error § 181(a)(1)'s unqualified mandate that "[e]ach" Subpart 2 area "shall" be classified under that table. In short, for areas with design value <0.121, the choice is not between an absurd reading and a sensible one – it is between an *impossible* reading (that § 181(a)(1) applies to nonattainment areas under the 1997 NAAQS with design value <0.121) and a possible one (that § 181(a)(1) does not apply to such areas). Thus, because Subpart 2 specifies no classifications or attainment dates under the 1997

NAAQS for areas with design value <0.121, the ouster clauses of § 172(a)(1)(C) and (a)(2)(D) do not apply, and the Subpart 1 classification and attainment date provisions govern.

Control Measures. Strikingly, industry and Ohio offer no defense whatsoever of the D.C. Circuit's ruling (App. 34a) that the 1997 NAAQS must be implemented only in accordance with the "control measures" of Subpart 2, and no response to ALA's refutation of this ruling. *See* ALA Br. 42-44. In particular, they have pointed to no statutory ouster provision (comparable to § 172(a)(1)(C) and (a)(2)(D)) that even colorably could be said to displace the § 172(b) and (c) provisions concerning submission and content of pollution control plans. Instead, by arguing broadly that the new NAAQS cannot be implemented "in any fashion" (ATA Br. 29) – an assertion which if accepted would override the pollution control plan provisions of § 172(b) and (c) – ATA treats as a scrivener's error the absence from § 172(b) and (c) of an ouster provision.

ATA's argument must be rejected for another reason as well. If ATA were correct that § 181(a)(1) applies to all nonattainment areas under the 1997 ozone NAAQS, then many areas with design value ≥0.121 would by the express terms of the Act be required to submit – by dates that had already expired when the 1997 NAAQS was promulgated – pollution control plans providing for attainment of that NAAQS. ALA Br. 42-44. What was said above concerning classifications and attainment dates for such areas applies here also: a hybrid reading (under which the first sentence of § 181(a)(1) applies to areas designated nonattainment under the new NAAQS, but the pollution control plan submission requirements of

§ 182(b)(1)(A)(i) and (c)(2)(A) apply only to the 1979 NAAQS) is not an available reading of the statute. ATA's attempt to advance such a hybrid argument reduces the broad language of § 182(b)(1)(A)(i) and (c)(2)(A) – which refers to plans to attain "the national primary ambient air quality standard for ozone" and "the ozone national ambient air quality standard," rather than just the 1979 standard – to a scrivener's error.

Designation of nonattainment areas. ATA's argument that EPA may not designate nonattainment areas under the new NAAQS, ATA Br. 39, 41, must (assuming *arguendo* it is properly before the Court) be rejected – as it was by the D.C. Circuit. App. 36a-37a. Aside from being based on the erroneous premise that § 181(a)(1) applies to the new NAAQS, ATA's argument ignores the plain language of 107(d), which provides that, "not later than 1 year after promulgation of a *new or revised*" NAAQS, "the Governor of *each* State *shall* . . . submit to the Administrator a list of *all* areas (or portions thereof) in the State, designating as . . . nonattainment, *any* area that does not meet" that NAAQS. § 107(d)(1)(A) (emphasis added). Once again, ATA attempts to treat comprehensive and mandatory statutory language as a scrivener's error.[8]

[8] Contrary to ATA (Br. 39, 41), where available information indicates an area is violating a revised NAAQS, the area cannot be designated as "unclassifiable" for that NAAQS. Such a designation is available only for an area that "*cannot* be classified on the basis of available information as meeting *or not meeting*" NAAQS. § 107(d)(1)(A)(iii) (emphasis added).

B. The 1990 Amendments Left Unchanged EPA's Pre-existing Authority to Promulgate Revised NAAQS.

Recognizing that EPA cannot plausibly be barred from implementing a NAAQS that it has validly promulgated, Ohio argues that the 1990 Amendments stripped EPA of authority to promulgate a revised ozone NAAQS in the first place. Ohio Br. 29-31. This argument – again, assuming *arguendo* it is properly before the Court – must be rejected. As the D.C. Circuit correctly held, the 1990 Amendments made no change in EPA's duty to review – and, as appropriate, revise – NAAQS at least every five years. App. 34a (citing § 109(d)(1)). Neither Ohio nor anyone else has pointed to a shred of evidence in the statutory text (or even legislative history) that the 1990 Amendments intended to limit or abrogate this fundamental duty, which is the very heart of the Act's health-protection mandate. *See generally* ALA 99-1426 Br. Incredibly, Ohio cites as support for *precluding* tightening of the 1979 ozone NAAQS a committee report that recognized such tightening might well be necessary to protect public health. S. Rep. 228, 101st Cong., 1st Sess. 6-7 (1989). *See* Ohio Br. 22, 23, 25.

Far from revoking EPA's pre-existing revision authority, the 1990 Amendments enacted § 172(e), which clearly presupposes that EPA retains authority to revise NAAQS. App. 35a. The D.C. Circuit found "[t]elling[ ]" the failure of industry and Ohio to address § 172(e), *id.*, and their continuing failure to do so in this Court is even more striking.[9]

[9] Contrary to Appalachian Power's implication, APC Br. 49-50, EPA's revision authority is not *limited* to promulgating

C. The Structure of the Act's NAAQS Revision and Implementation Provisions Offers No Basis for Overriding the Statute's Express Language.

Deprived of its purported textual argument, industry is left with the vague assertion that Congress intended Subpart 2 to be the exclusive ozone program for the nation, thus displacing Subpart 1. ATA Br. 32-38; APC Br. 47-49; Ohio Br. 21-26. But Congress specified, in the ouster provisions of § 172(a)(1)(C) and (a)(2)(D), the exact extent to which it wanted Subpart 2 to displace Subpart 1 – and those ouster clauses do not apply to the new ozone NAAQS.

Where the ouster clauses are inapplicable, application of Subpart 1 not only does not disserve congressional intent – it is necessary in order to obey Congress's intent that Subpart 1 apply to "*any* revised standard, including a revision of *any* standard in effect on November 15, 1990." § 172(a)(1)(A) (emphasis added). Far from being a pre-existing relic that Congress "abandoned" (Ohio Br. 9) or "ghettoized" (ATA Br. 38), Subpart 1 was extensively rewritten in 1990, and thus reflects the contemporaneous intent of the same Congress that enacted Subpart 2. Indeed, the 1990 House committee report – the *same* report cited by industry as evidence of the alleged exclusiveness of Subpart 2 (APC Br. 47; ATA Br. 33; Ohio Br. 13) – expressly reaffirms the applicability of Subpart 1 to ozone. ALA Br. 42. Thus, the Act's language, as well as its

---

relaxations of NAAQS. Section 172(e), while clearly establishing the 1990 Congress's intent that EPA retain its NAAQS revision authority, does not itself confer such authority. Rather, EPA's NAAQS revision authority emanates from § 109, which clearly requires the agency to promulgate *whatever* revised NAAQS are "appropriate" in light of the health effects evidence.

legislative history, refute the notion that Subpart 2 was intended to be the nation's sole ozone abatement program.

Moreover, the argument that implementation of the new NAAQS under Subpart 1 will undermine Subpart 2 is meritless. First, for areas that are in attainment of the 1979 NAAQS, Subpart 2 specifies no classifications and attainment dates. *See* pp. 14-15, *supra*. Accordingly, application of Subpart 1 in such areas could not possibly conflict with the Subpart 2 program. *See* App. 84a-88a (Tatel, J., concurring).

Second, for areas that are in nonattainment status under the 1979 standard, application of Subpart 1 will likewise not undermine Subpart 2. EPA has expressly decided that the 1979 NAAQS – and the associated Subpart 2 implementation strategies – will remain in place for each such area until the area meets the 1979 NAAQS. In the meantime, EPA requires areas to move towards compliance with both standards, thus respecting the clear timetables of § 172, and avoiding the adverse impacts that would flow from sequential implementation: specifically, requiring implementation of the 1997 NAAQS to await attainment of the 1979 NAAQS would prolong the time period during which the public suffers adverse health impacts, ALA Br. 49, and would also be less efficient for industry and for government anti-pollution officials, who would need to gear up for two rounds of pollution reductions addressing largely the same emissions sources.[10]

---

[10] In any event, EPA has stated that there is only one area where compliance with the 1997 standard could be required at the same time as with the 1979 standard. App. 88a. While Intel notes that areas must have three years of clean data in order to

CONCLUSION

The Court should grant the relief requested in ALA's opening brief (at 50). In doing so, the Court should reject industry's argument (ATA Br. 47-48) that EPA's Question #3 challenges only the rationale of the D.C. Circuit's decision: the D.C. Circuit's Subpart 2 implementation ruling was not a rationale for the court's ruling concerning EPA's authority to revise the NAAQS and designate nonattainment areas, but rather was a separate ruling reached only after the court had disposed of the revision and designation issues. App. 34a-43a. Finally, if this Court reaches the revision and designation issues, it should affirm the D.C. Circuit's ruling on those issues.

DATED: October 5, 2000.

Respectfully submitted,

HOWARD I. FOX
Earthjustice Legal Defense Fund
1625 Massachusetts Ave., N.W.,
Suite 702
Washington, D.C. 20036-2212
(202) 667-4500

Counsel of Record for
American Lung Association

---

be considered in attainment of the 1997 NAAQS by the Subpart 1 deadline, Intel Br. 20-21, it fails to point out that three years of clean data are also required in order for areas to be considered in attainment of *the 1979 NAAQS by the Subpart 2 deadlines*. App. 32a n.6.

(21)

No. 99-1257

Supreme Court, U.S.
FILED
SEP 6 2000
CLERK

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SENATOR ORRIN HATCH AND REPRESENTATIVE TOM BLILEY IN SUPPORT OF RESPONDENTS

LLOYD N. CUTLER
C. BOYDEN GRAY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

CARTER G. PHILLIPS
ALAN CHARLES RAUL *
STEPHEN B. KINNAIRD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

September 11, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

38pp

QUESTION PRESENTED

Whether the Environmental Protection Agency's interpretation of Section 109 of the Clean Air Act, in conformity with *Lead Industries Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980), effects an unconstitutional delegation of legislative power?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
I. NONDELEGATION IS A VITAL PRINCIPLE OF SEPARATION OF POWERS THAT GUARDS AGAINST GRANTS OF ARBITRARY POWER TO THE EXECUTIVE	6
A. Congress May Not Grant The Executive Branch (And The Executive May Not Usurp) Arbitrary Power Unbounded By Law	6
B. The Nondelegation Doctrine Has Emerged As An Important Canon Of Statutory Construction To Constrain Executive Power	8
C. The Arbitrariness Of A Grant Of Power Depends On Context	10
D. Whether *Lead Industries* Is Inconsistent With The Nondelegation Doctrine Must Be Determined In Light Of The Statutory Context Of Scientific Indeterminacy And Vast Administrative Power	13
II. THE *LEAD INDUSTRIES* INTERPRETATION OF SECTION 109 DOES NOT PROVIDE AN INTELLIGIBLE PRINCIPLE CONSTRAINING THE ADMINISTRATOR'S POWER	17

TABLE OF CONTENTS—Continued

Page

A. Under A Proper Interpretation Of Section 109, The Principle Of Cost-Effectiveness Constrains The Administrator's Discretion When The Scientific Evidence Is Indeterminate 17

B. The *Lead Industries* Rule That EPA May Only Rely Upon Scientific Factors Even When Science Is Indeterminate Violates Nondelegation Principles 20

C. The Arbitrariness Of The *Lead Industries* Rule Is Evident In The PM And Ozone Rulemakings 26

1. PM Rulemaking 26

2. Ozone Rulemaking 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 4, 7, 8, 11

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) 9, 22, 23, 25

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) ..... *passim*

Arizona Grocery Co. v. *Atchison T. F. & S. Ry.*, 284 U.S. 370 (1932) 13

Baltimore Gas & Elec. v. *NRDC*, 462 U.S. 87 (1983) 30

Buttfield v. *Stranahan*, 192 U.S. 470 (1904) 7, 8, 12, 17, 20

Chemical Mfrs. Ass'n v. *EPA*, 28 F.3d 1259 (D.C. Cir. 1994) 27

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 30

Chlorine Chemistry Council v. *EPA*, 206 F.3d 1286 (D.C. Cir. 2000) 27

Clinton v. *City of New York*, 524 U.S. 417 (1998) 7, 9, 10, 11

Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) 13, 30

FDA v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) 5, 30

Federal Power Comm'n v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 12

Federal Radio Comm'n v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933) 7, 10, 11, 12, 13

Field v. *Clark*, 143 U.S. 649 (1892) 6, 8, 12

Flue-Cured Tobacco Coop. Stabilization Corp. v. *EPA*, 4 F. Supp. 2d 435 (M.D.N.C. 1998) 28

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 13

TABLE OF AUTHORITIES—Continued

Page

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) 6, 9, 10, 11, 15
International Union, UAW v. *OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) 20
Interstate Commerce Comm'n v. *Goodrich Transit Co.*, 224 U.S. 194 (1912) 12
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928)..... 10
Kent v. *Dulles*, 357 U.S. 116 (1958)..... 9, 11
Lead Indus. Ass'n v. *EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ..... *passim*
Lichter v. *United States*, 334 U.S. 742 (1948).....7, 10, 11
Louisiana Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355 (1986)..... 7
Loving v. *United States*, 517 U.S. 748 (1996).....6, 7, 10, 24
Michigan v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) 11
Missouri v. *Jenkins*, 515 U.S. 70 (1995)..... 13
Mistretta v. *United States*, 488 U.S. 361 (1989).... 9
Motor Vehicle Mfrs. Ass'n of United States, Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)..... 30
Natural Resources Defense Council, Inc. v. *EPA*, 902 F.2d 962 (D.C. Cir. 1990), *vacated in part on other grounds*, 921 F.2d 326 (D.C. Cir. 1991) 13
National Broad. Co. v. *United States*, 319 U.S. 190 (1943).....10, 12, 23, 25, 29
National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974)..... 8, 9
New York Cent. Sec. Corp. v. *United States*, 287 U.S. 12 (1932).....10, 12, 13

TABLE OF AUTHORITIES—Continued

Page

Opp Cotton Mills v. *Administrator of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126 (1941)..... 12
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989)..... 8, 11
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940).....8, 12, 24
Touby v. *United States*, 500 U.S. 160 (1991) 8, 9, 10
Union Bridge Co. v. *United States*, 204 U.S. 364 (1907).....7, 11, 12
Union Elec. Co. v. *EPA*, 427 U.S. 246 (1976)..... 24
United States v. *Grimaud*, 220 U.S. 506 (1911).....10, 11, 12
United States v. *Mazurie*, 419 U.S. 544 (1975)..... 10
Vance v. *Bradley*, 440 U.S. 93 (1979)..... 8
Wayman v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825)..... 8
Yakus v. *United States*, 321 U.S. 414 (1944).....11, 17, 29

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 1..... 6
Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 1998 U.S.C.C.A.N. (112 Stat.) 107 (1998) 14
5 U.S.C. § 706..... 16
42 U.S.C. § 7401 23
§ 7408..... 17, 18
§ 7409.....3, 17, 18, 19
§ 7607(d)..... 16, 19
§ 7612(a)(1) 19

FEDERAL REGULATIONS

National Ambient Air Quality Standards for Ozone; Proposed Decision, 61 Fed. Reg. 65,715 (1996)..... 28

TABLE OF AUTHORITIES—Continued

Page

National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,651 (1997) 15, 21, 27
National Ambient Air Quality Standards for Ozone; Final Rule, 62 Fed. Reg. 38,855 (1997) 15, 19, 21, 28

COURT RULES

Sup. Ct. R. 37.3 1
Sup. Ct. R. 37.6 1

LEGISLATIVE HISTORY

H.R. Rep. No. 95-294 (1977) 18, 22

SCHOLARLY AUTHORITIES

Stephen A. Breyer, *The Vicious Cycle* (1993) ... 14, 22, 23
Leonard M. Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. Pa. L. Rev. 1597 (1992) 25
Michael Gough & Steven Milloy, *EPA's Cancer Risk Guidelines: Guidance To Nowhere*, Cato Policy Analysis No. 263 (Nov. 12, 1996), *available at* http://www.cato.org/pubs/pas/pa-263.html 26
Phillip K. Howard, *The Death of Common Sense* (1994) 28
Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policy Makers* (1990) 13, 14, 15, 23
Douglas H. Johnson, *The Insignificance of Statistical Significance Testing*, 63 J. of Wildlife Mgmt. 763 (1999), *available at* http://www.npwrc.usgs.gov/resource/1999/statsig/stathyp.htm 27

TABLE OF AUTHORITIES—Continued

Page

David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Federal Judical Ctr., *Reference Manual on Scientific Evidence* 331 (1994) 27
Alon Rosenthal et al., *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 Ecology L.Q. 269 (1992) 22
Cass R. Sunstein, *Is The Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999) 23
Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995) 14

OTHER AUTHORITIES

Office of Air Quality Planning and Standards, EPA, *National Air Quality and Emissions Trends Report, 1998*, *at* http://www.epa.gov/oar/aqtrnd98 (last modified June 2, 2000) 14
R.G. Whitfield, *A Probabilistic Assessment of Health Risks Associated With Short-Term Exposures to Tropospheric Ozone: A Supplement* (Jan. 1997) 28
Letter from George Wolff, Chair, CASAC, to Carol Browner, Administrator, EPA (Nov. 30, 1995) 15

INTEREST OF *AMICI CURIAE* [1]

Amicus Orrin Hatch is a Member of the United States Senate from Utah, and *amicus* Tom Bliley is a Member of the United States House of Representatives from Virginia. *Amici* are both concerned that the Environmental Protection Agency's ("EPA") implementation of the Act is contrary to congressional will, undermines the separation of powers, and frustrates effective congressional and judicial oversight. Because EPA has been hamstrung by an erroneous judicial precedent that irrationally prevents the agency from considering the cost effectiveness of its regulations, and that provides no other constitutionally required intelligible principles to constrain the agency's discretion, EPA engages in a science charade wherein policy and economic judgments are masked as scientific determinations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves a statutory provision that confers unusually broad administrative power. Under this Court's teaching, the statute—and the Agency's interpretation of its authority thereunder—must receive "separation of powers" scrutiny commensurate with the potential impacts on society.

On petition for review of the revised national ambient-air quality standards ("NAAQS") for particulate matter ("PM") and ozone set by the EPA pursuant to section 109 of the Clean Air Act ("Act"), the United States Court of Appeals for the District of Columbia held that "the construction of the Clean Air Act on which EPA relied in promulgating the

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for any party authored this brief in whole or in part, and that Citizens for a Sound Economy has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Office of the Clerk of this Court. *See* Sup. Ct. R. 37.3.

NAAQS at issue here effects an unconstitutional delegation of legislative power." Pet. App. 4a. The court declared that it was not enough that EPA had identified the factors it used in determining standards, for "EPA appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute." *Id.* at 5a. Noting that there is no threshold concentration below which ozone and PM do not adversely affect health, that EPA has declined to read section 109 to require it to eliminate all health risks, and that the decisional factors listed by EPA "do not themselves speak to the issue of degree," *id.* at 7a, the court of appeals correctly held that "EPA lacks . . . any determinate criterion for drawing lines" and "has failed to state intelligibly how much is too much." *Id.* at 6a.

The court found no enlightenment in the agency preambles for the final rules, which amounted to little more than a showing "that EPA is applying the stated factors and that larger public health harms (including increased probability of such harms) are, as expected, associated with higher pollutant concentrations." *Id.* at 10a. The Agency's identification of relevant factors did not provide any intelligible principle limiting agency discretion; EPA's rationale "could as easily, for any non-threshold pollutant, justify a standard of zero." *Id.* at 11a. Cost-benefit analysis, the Court observed, would avoid such indeterminacy, but D.C. Circuit precedents "read § 109(b)(1) as barring EPA from considering any factor other than 'health effects relating to pollutants in the air.'" Pet. App. 15a (citing, *inter alia*, *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)).[2]

[2] The Government suggests that the court of appeals wandered off into the constitutional thicket on its own by stating that the court "[r]el[ied] on a theory that the parties had not extensively briefed." U.S. Br. 15. To the contrary, the issue was amply briefed below. Not only was the issue raised by the "Small Business Petitioners," Pet. App. 5a, but *amici curiae* Senator Hatch (in the PM case) and Representative Bliley (in the ozone case) each submitted full-length briefs devoted to the nondelegation issue. In the ozone case, the Government moved to strike the Bliley brief, but its motion was denied. Order, No. 97-1441 (D.C. Cir. May 19, 1998). In the PM case, the Government requested, and was granted, additional pages to brief the nondelegation issue in response to the Hatch brief. Order, No. 97-1440 (D.C. Cir. June 25, 1998).

The court of appeals was thus forced to address the constitutional issue of nondelegation only because it was constrained to follow the erroneous circuit precedent of *Lead Industries*. As demonstrated in the brief of *amici curiae* in the companion case No. 99-1426 ("Hatch/Bliley Br."), the Clean Air Act does permit the EPA Administrator to consider cost-benefit analysis in setting NAAQS. Where Congress has not mandated a "zero risk" standard (as EPA concedes) and scientific evidence of public-health dangers is not itself determinative, cost-effectiveness (including cost-benefit balancing) is a necessary risk-management principle that guides and limits the Administrator's choice of a NAAQS that is "requisite to protect the public health" and "allow[s] an adequate margin of safety," 42 U.S.C. § 7409(b)(1). While Congress has made the fundamental choices about environmental regulation, it relies on the Administrator to determine the precise level of NAAQS based on her expert consideration of the best science, medical data, and *all* of the other relevant factors requisite to assure the public health is adequately protected.

Lead Industries's exclusion of cost-benefit balancing empowers the Administrator to regulate without limits. Unwilling to admit or surrender the unfettered discretion it exercises, EPA engages in "science charades" that mask inevitable cost-based decisions as science-based, and it effectively abandons—on covert grounds—the core Clean Air Act goal of NAAQS attainment. Hatch/Bliley Br. 25-30 (discussing negative implications for attainment of the President's $10,000 per ton cap on "implementation" costs).

Not only is the error of *Lead Industries* manifest, but the doctrine of avoidance of constitutional questions compels its rejection by this Court. The prohibition against delegation of legislative power committed exclusively to Congress by Article I is an indispensable element of separation of powers. In modern jurisprudence, the nondelegation doctrine plays a vital role as a canon of statutory construction by which this Court narrowly construes broad statutory grants of authority to supply meaningful and constitutionally necessary constraints on agency discretion. The decision below is thus right in line with this Court's application of the nondelegation doctrine subsequent to the era that produced *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935).

As this Court's precedents make clear, whether a given statutory delegation is an unconstitutional grant of arbitrary power to an agency depends critically on context. The Government and its supporters miss this point by mechanically citing the language of statutory delegations upheld by this Court in the past, without regard to the statutory and factual contexts defining limits for those delegations. The context for setting NAAQS under the Clean Air Act is fundamentally different because of the conceded indeterminacy of the relevant science and the unparalleled power the Administrator wields under section 109 over states, local governments, and the American public. The non-delegation decisions of this Court require a narrowing construction of administrative authority to ensure that such power is properly circumscribed.

Lead Industries extinguished intelligible principles that could constrain the Administrator's judgment in this context. The principle suggested by the Government and its supporters—that the Administrator has a mandate to protect the public health by setting NAAQS based only on scientific or medical evidence of health risks suffered by sensitive populations—does not in fact provide any decisional

principle to guide the Administrator in deciding which health risks she will abate and which she will tolerate. The Administrator has acknowledged that Congress did not intend NAAQS to be set at a level to eliminate all health risks, for that would be harmful to the country. Thus, EPA is essentially rationing public health protections: it has set the ozone and PM NAAQS at levels that will protect some populations from health impairment, but not others.

The Administrator purports to rely exclusively on science-based criteria in making those choices. But risk management, which is what the NAAQS provisions of the Act require, is not that simple. Under the *Lead Industries* regime, EPA is denied the measuring stick necessary to make comparative judgments about public-health impacts. As a result, EPA cannot forthrightly justify where it has drawn the lines of protection. *Lead Industries* thus leads to incoherence and science charades, as these rulemakings demonstrate. See *infra* at 26-29. Congress cannot be presumed to have delegated to the Administrator such massive power over American life without a rational principle to direct her judgments. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000). Under such a reading, the Administrator exercises an impermissible power, legislative in nature, to allocate health protections based on arbitrary (and not fully disclosed) factors.[3]

Section 109 is not unconstitutional simply because *Lead Industries* does not supply an intelligible limiting principle; rather, this Court's nondelegation jurisprudence requires that this Court, if at all possible, adopt an alternative construction

---

[3] EPA's ozone rule fails to protect perhaps an additional 18,000 children from moderate or severe pain on inspiration without any basis in the scientific evidence to differentiate them from children who are protected. *See infra* at 28-29. If EPA has denied this protection on any basis other than balancing the overall benefits and costs to the public, its decisionmaking is illegitimate as well as arbitrary.

with limiting principles that deflect doubts about a statute's constitutionality. As the court below acknowledged, cost-effectiveness is an intelligible principle to guide the Administrator in allocating health care protection under the Act—indeed, it is the universally accepted principle of environmental risk management and line-drawing. Nothing in the statute prohibits the Administrator from considering cost-effectiveness, and, as argued in the companion case, the statutory text, structure, and history indicate that Congress intended the Administrator to take such factors into account. This Court should reject *Lead Industries* and hold that the Administrator may consider the cost-effectiveness of alternative standards where the science is inconclusive.

I. NONDELEGATION IS A VITAL PRINCIPLE OF SEPARATION OF POWERS THAT GUARDS AGAINST GRANTS OF ARBITRARY POWER TO THE EXECUTIVE.

A. Congress May Not Grant The Executive Branch (And The Executive May Not Usurp) Arbitrary Power Unbounded By Law.

Article I, section 1 of the Constitution grants "[a]ll legislative Powers" exclusively to Congress. See U.S. Const. art. I, § 1. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892). This principle "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment); *Loving* v. *United States*, 517 U.S. 748, 757-58 (1996). The nondelegation doctrine thus "prevent[s] Congress from forsaking its duties," even when it does not

encroach upon the prerogatives or impair the functioning of a coordinate branch. *Id.* at 758. "Abdication of responsibility is not part of the constitutional design." *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Nondelegation is not, however, strictly a matter of preventing one branch's exercise of functions properly belonging to another. This doctrine applies not only to circumstances where the executive is given the power to issue prospective rules with the force and effect of law (although such power is granted here), but also to the quintessentially executive function of administering a statute in a specific case.[4] All federal executive authority not independently derived from the Constitution must be granted by Congress, *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 374 (1986), and no officer may be given power unbounded by law. The fundamental concern in any kind of statutory delegation to the executive branch is whether it grants "arbitrary discretion," *Buttfield* v. *Stranahan*, 192 U.S. 470, 496 (1904); *Union Bridge*, 204 U.S. at 387; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933); *Schechter Poultry*, 295 U.S. at 537, whereby the executive acts as a law unto itself. See *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring) (nondelegation is a vertical protection of the citizenry as well as a horizontal protection of the division of power among the

---

[4] *See, e.g., Lichter* v. *United States*, 334 U.S. 742, 775-76 (1948) (authorization of administrative officials to renegotiate a wartime contract based on a determination that the contractor earned "excessive profits"); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 96-97 (1946) (authorization of SEC, after an opportunity for a hearing, to order a holding company to adopt a corporate structure that equitably distributes shareholder voting power); *Union Bridge Co.* v. *United States*, 204 U.S. 364, 367-68 (1907) (authorization of Secretary of War, after an opportunity for a hearing, to order a bridge owner to remove unreasonable obstructions to navigation).

branches). Congress has broad power to draw policy lines subject to the minimal constraints of legislative rationality, see *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (permitting Congress to set mandatory retirement age of 60 for foreign service officers); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974), but the executive does not.

B. The Nondelegation Doctrine Has Emerged As An Important Canon Of Statutory Construction To Constrain Executive Power.

The essential inquiry in this Court's nondelegation jurisprudence is to ascertain when the executive discretion granted by Congress is arbitrary. Delegation of discretionary authority has long been recognized as a legitimate attribute of legislative power, see *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *Field* v. *Clark*, 143 U.S. 649, 693-94 (1892), and this Court has not hesitated to approve even " 'broad' standards for administrative action" that are "a reflection of the necessities of modern legislation dealing with complex economic and social problems." *American Power & Light*, 329 U.S. at 105 ("Necessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ."); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940). But even so, discretion, in Justice Cardozo's famous words, must be "canalized within banks that keep it from overflowing" and not "unconfined and vagrant." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring); *Touby* v. *United States*, 500 U.S. 160, 166 (1991) (the statute must "meaningfully constrain[] the [officer's] discretion"). Congress must fix the "primary standard," *Buttfield*, 192 U.S. at 496, against which executive action may be measured so that a court may " ' "ascertain whether the will of Congress has been obeyed." ' " *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 379 (1989) (quoting *Yakus* v. *United States*,

321 U.S. 414, 426 (1944))); see also *Clinton*, 524 U.S. at 484 (Breyer, J., dissenting). In this Court's classic formulation, "[s]o long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Touby*, 500 U.S. at 165 (brackets omitted) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). Cf. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (interpreting statute to require agency "to apply *some* limiting standard, rationally related to the goals of the Act").

Although this Court has struck down statutes as violating the nondelegation doctrine only in two 1935 decisions, *Panama Refining* and *Schechter Poultry*, the doctrine remains an important canon of interpretation employed to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989). Thus, in *Kent* v. *Dulles*, 357 U.S. 116, 128-29 (1958), this Court invoked nondelegation principles to narrow a statute to deny the Secretary of State "unbridled discretion" to restrict the right of citizens to travel. See also *National Cable*, 415 U.S. at 342 (avoiding nondelegation problem by narrowing power of agency to assess fees). And, in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980), a case strikingly parallel to this one, the Occupational Safety and Health Administration (OSHA) had interpreted its organic statute to permit it to promulgate workplace standards to regulate any health risks from dangerous substances. Noting that OSHA's construction suggested a grant of "unprecedented power over American industry" to an administrative agency to engage in "pervasive regulation limited only by the constraint of feasibility," *id.* at 645, a plurality of this Court narrowed the statute to empower OSHA to regulate only "significant" risks to health and safety. *Id.* at 642. Otherwise, this Court held, "the statute would make such a

'sweeping delegation of legislative power' that it might be unconstitutional under the [nondelegation doctrine]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* at 646; see also *id.* at 672-76 (Rehnquist, J., concurring in the judgment) (voting to invalidate the statute as an unconstitutional delegation of legislative power).

C. The Arbitrariness Of A Grant Of Power Depends On Context.

As this Court's nondelegation precedents make clear, whether a statute delegates arbitrary power depends critically on context. *Lichter*, 334 U.S. at 785 ("Standards prescribed by Congress are to be read in light of the conditions to which they are to be applied."); *American Power & Light*, 329 U.S. at 104 (statutory standards are not to "be tested in isolation," but "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear"); *Nelson Bros.*, 289 U.S. at 285; *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932); *National Broad. Co.* v. *United States*, 319 U.S. 190, 215-16, 219 (1943) ("*NBC*"); see also *Clinton*, 524 U.S. at 488 (Breyer, J., dissenting). The intelligible-principle rule is always the same, but the sufficiency of a given standard under that rule turns not just on the bare language of the statute, but on numerous factors specific to the statutory scheme. Thus, the arbitrariness of a delegation may depend upon the clarity of statutory purposes, *American Power & Light*, 329 U.S. at 105; *New York Central*, 287 U.S. at 24-25, the complexity of the subject matter of regulation, *NBC*, 319 U.S. at 219, the variability of factual conditions, *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 404-05 (1928); *United States* v. *Grimaud*, 220 U.S. 506, 516 (1911), the exigency of circumstances, *Touby*, 500 U.S. at 168; *Lichter*, 334 U.S. at 779-80, the nature of power being exercised and of the officer exercising it, *Loving*, 517 U.S. at 772; *United States* v.

Mazurie, 419 U.S. 544, 556-67 (1975),[5] past administrative practice, *Kent*, 357 U.S. at 127-28; *Lichter*, 334 U.S. at 777-78, 783, the presence of procedural safeguards, *Lichter*, 334 U.S. at 786-87; *Union Bridge*, 204 U.S. at 387, whether the regulation concerns government property or the public domain, *Grimaud*, 220 U.S. at 521; *Nelson Bros.*, 289 U.S. at 282, whether constitutionally protected rights are at stake, *Kent*, 357 U.S. at 128-29, and whether unusually broad administrative power is conferred, *Industrial Union*, 448 U.S. at 645-46; *Schechter Poultry*, 295 U.S. at 542; *Michigan* v. *EPA*, 213 F.3d. 663, 680-81 (D.C. Cir. 2000).

The Government and its supporters disregard the crucial element of context by mechanically citing broad language of delegation in statutes that have been upheld by this Court; they argue that, even under *Lead Industries*, the detailed prescriptions of section 109 cannot be unconstitutional in light of past decisions of this Court upholding standards such as the "public interest," "public convenience," justice and equity, and reasonableness. Cf. U.S. Br. at 22, 25; Mass Br. at 29, 35; see also Pet. App. 59a-60a (Tatel, J., dissenting in part). The cited cases, however, involved circumstances where there were ascertainable historical facts that could be found by the administrative or executive officer; the officer's judgment (whether embodied in an order or a generally applicable regulation) could be applied to those facts and tested by a court against reason and statutory purpose. The broad standards at issue in those cases related to administrative determinations based on the actual costs or conditions of a particular company or industry,[6] on historical

---

[5] *Cf. Clinton*, 524 U.S. at 445 (noting special foreign-affairs context of *Field* v. *Clark*).

[6] *See Skinner*, 490 U.S. at 219-20 (imposition of fees on pipeline companies based on "reasonable relationship" to their specific volume-miles, miles, and revenues); *Lichter*, 334 U.S. at 785-86 (determination of "excessive profits" earned on a specific government contract based on cost investigation); *Yakus* v. *United States*, 321 U.S. 414, 420-21 (1944)

practices or exigencies of a specific industry,[7] or on narrowly defined and detailed factual investigation of a particular subject matter.[8] Because the statutory standards at issue were tethered to ascertainable facts and conditions, this Court has repeatedly stated that even broad standards such as the "public interest" are not "indefinite" given the context and the

(wartime fixing of maximum prices for commodities that are "just and equitable" after ascertainment of "prevailing prices" with adjustments for factors such as speculation, cost changes, and profit trends); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (determination of "just and reasonable rate[s]" for a specific utility based on its cost structure); *Opp Cotton Mills* v. *Administrator of Wage Hour Div. of Dep't of Labor*, 312 U.S. 126, 144-46 (1941) (determination of minimum wages for classes of industry based on factfinding regarding competitive conditions and effect on employment); *Sunshine Anthracite Coal*, 310 U.S. at 397-98 (determination of maximum and minimum prices for coal based on prevailing costs-per-ton and market prices, with exemptions to ensure "fair return" or "fair value" for every mine); *American Power & Light*, 289 U.S. at 105 (determination of fairness of distribution of voting power of shareholders of a specific corporation); *New York Cent.*, 287 U.S. at 24-25 (determination of whether a specific railroad's acquisition of control of another's line is in the "public interest").

[7] *See NBC*, 319 U.S. at 217 (regulation of radio licensees); *Nelson Bros.*, 289 U.S. at 282 (same); *Interstate Commerce Comm'n* v. *Goodrich Transit Co.*, 224 U.S. 194, 214-15 (1912) (formulation of uniform systems of accounts to monitor common carriers by water); *Grimaud*, 220 U.S. at 515-16, 521 (authorization of regulations of "occupancy and use" for preservation of national forests, which persons use under an "implied license" from the Government).

[8] *See Union Bridge*, 204 U.S. at 386-87 (determining after hearing whether a particular bridge examined by the Army Corps of Engineers was an unreasonable obstruction to navigation); *Buttfield*, 192 U.S. at 494-95 (issuance of standards of "purity, quality, and fitness for consumption" based on expert rankings of imported teas); *Field*, 143 U.S. at 692-93 (suspension of free importation of articles after investigation as to whether exporting country imposed duties that were "reciprocally unequal and unreasonable").

statutory purposes. See, *e.g.*, *Nelson Bros.*, 289 U.S. at 285; *New York Cent.*, 287 U.S. at 24.[9]

D. Whether *Lead Industries* Is Inconsistent With The Nondelegation Doctrine Must Be Determined In Light Of The Statutory Context Of Scientific Indeterminacy And Vast Administrative Power.

The context of the Clean Air Act is fundamentally different from that of statutes reviewed in this Court's prior nondelegation decisions (except for *Industrial Union*) in two important respects. The first is the inherently subjective nature of regulatory science. As Sheila Jasanoff has documented, there has been a profound shift in administrative regulation from traditional factfinding and industry expertise to the "new" administrative agencies such as EPA engaged in "regulatory science." Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policy Makers* 40-45 (1990).[10] Regulatory science is different from rigorous research science; it is policymaking requiring "'predictions ... at the frontiers of science.'" *NRDC* v. *EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990), *vacated in part on other grounds*, 921 F.2d

[9] Reasonableness, fairness, justice, equity, and the public interest are not lawless standards for fact-specific judgments; they are the foundational standards of the common law and equity. *Cf. Missouri* v. *Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (discussing historical conception that principles of equity do not grant " 'arbitrary discretion' " to the courts); *Hecht* v. *Bowles*, 321 U.S. 321, 329 (1944) (equity is "the instrument for nice adjustment and reconciliation between the public interest and private needs"). Such standards do not become lawless when applied to fact-based administrative agency determinations. *See Arizona Grocery Co.* v. *Atchison T. F. & S. Ry.*, 284 U.S. 370, 384-85 (1932) (describing shift of determination of reasonableness of railroad rates from courts to administrative agencies).

[10] *Cf. Daubert* v. *Merrell Dow Pharms, Inc.*, 509 U.S. 579, 593 (1993) (citing Jasanoff regarding issues of reliability of scientific evidence).

326 (D.C. Cir. 1991); Jasanoff, *supra*, at 94 (regulators draw conclusions that "involve subjective judgment, and even policy, to compensate for the absence of hard knowledge"). When regulators issue rules, "[t]hough the answer may be couched in technical terms, as a verdict about the adequacy of evidence, it necessarily incorporates a sociopolitically colored judgment about the acceptability of risk." *Id.* at 232; see also Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1617 (1995). The uncertainties inherent in regulatory science are particularly acute as administrative agencies push for the "last 10 percent" of environmental protection. See Stephen A. Breyer, *The Vicious Cycle* 11 (1993).[11]

This case amply demonstrates that proposition. The massive scientific uncertainties about the existence of any health effects from fine PM are uniformly acknowledged (by the President, Congress, CASAC, the National Academy of Sciences, and EPA itself), and Congress had appropriated large sums for further research with the express intent that EPA delay further rulemaking. Hatch/Bliley Br. 2-3; see also Pub. L. No. 105-178, §§ 6101-6104, 1998 U.S.C.C.A.N. (112 Stat.) 107, 463-65 (1998) (codified at 42 U.S.C. § 7407 note)

[11] The *Lead Industries* problem has thus become more important than ever before. While the air has gotten much cleaner under existing and past standards, Office of Air Quality Planning and Standards, EPA, *National Air Quality and Emissions Trends Report, 1998*, at 1, *at* http://www.epa.gov/oar/aqtrnd98 (last modified June 2, 2000), the country is still far from attaining the current NAAQS. Now, EPA is arrogating to itself the power to make arbitrary policy choices imposing dramatic costs on society without considering all relevant factors. This Court should not be swayed by arguments that Congress's enactment of procedural improvements in the NAAQS process obviates the need for close scrutiny of *Lead Industries* under the nondelegation doctrine. *See* Mass. Br. 36-38. The issue here is to vindicate the congressional mandate that the Administrator apply the *full* range of her expert judgment, based on *all* relevant circumstances, to set standards requisite to protect the public health.

(delaying implementation of revised NAAQS to allow for judicial review, and disclaiming ratification of those standards). For ozone, CASAC has declared that no "bright line" distinguishes any of the contemplated standards from any others in terms of health protection provided. Letter from George Wolff, Chair, CASAC, to Carol Browner, Administrator, EPA 3 (Nov. 30, 1995) (regarding CASAC closure on the primary standard portion of the Staff Paper for ozone). See *infra* at 26-29 (discussing EPA's reliance on indeterminate science). Indeed, the Administrator admits she is exercising "policy judgment," National Ambient Air Quality Standards for Particulate Matter; Final Rule, 62 Fed. Reg. 38,651, 38,668 (1997) ("*PM Rule*"); National Ambient Air Quality Standards for Ozone; Final Rule, 62 Fed. Reg. 38,855, 38,863, 38,867 (1997) ("*Ozone Rule*"), but maintains the fiction that her judgment is science-based, even though the setting of standards "necessarily" involves (and historically has involved) sociopolitical considerations such as cost. Jasanoff, *supra*, at 104-06, 232. EPA's stance aside, the nondelegation doctrine demands that the statute be interpreted in light of its context: *i.e.*, to give EPA intelligible principles by which to navigate extreme scientific uncertainty.

The second critical element of context that distinguishes other nondelegation cases is the sheer scope of the coercive power in the Administrator's hands here. The authority to set NAAQS is the power to dictate massive regulation of multitudinous sources by States and their political subdivisions in devising implementation plans under section 110. It is also undisputed, even by EPA's conservative estimate, that many billions of dollars in *annual* compliance costs, above and beyond what is required to meet current NAAQS, turn on every fractional change in the NAAQS. The plurality decision in *Industrial Union* recognized that the grant of vast power to an agency increases the risk of arbitrary action. 448 U.S. at 645-46. The court below likewise properly recog-

nized that such vast power demands a " 'more precise' " standard to ensure against arbitrary administrative action. Pet. App. 12a.

Thus, Judge Silberman, in his dissent from denial of rehearing en banc, was wrong to dismiss the nondelegation reasoning in *Industrial Union* as "a makeweight, tossed into the analysis, ... to help justify the result." Pet. App. 93a. First, nondelegation was central to the outcome of that decision, and justified the narrow construction adopted by the plurality. Second, because it interpreted the statute to ensure that the grant of power is not arbitrary in its context, *Industrial Union* is squarely within the tradition of this Court's nondelegation jurisprudence. Although not so much as mentioned in the Government's brief, that decision strongly supports rejecting *Lead Industries* in favor of a narrower construction. Indeed, the reasoning of *Industrial Union* applies *a fortiori* here, for EPA's power over the States and industrial sources under section 109 dwarfs that of OSHA to regulate hazardous workplaces.[12]

---

[12] The Government is also wrong to fault the court of appeals for allegedly misusing the nondelegation doctrine as an improper "additional means, beyond the explicit judicial review provisions of the CAA, to supervise the exercise of administrative discretion." U.S. Br. at 26. The Government (and Judge Silberman, Pet. App. 95a-96a) contend that the court could do no more than undertake the arbitrary-and-capricious review authorized by statute. *See* 5 U.S.C. § 706; 42 U.S.C. § 7607(d)(9)(A). However, the constitutional prohibition on grants of arbitrary (*i.e.*, legislative) power to executive agencies is neither coextensive with, nor satisfied by, arbitrary-and-capricious review. The former ensures that the statute itself does not grant arbitrary power to an agency; the latter addresses the narrow question of whether, in a specific instance, the agency has acted arbitrarily in exercising properly delegated power. Here, the court of appeals was thus not seeking "to supervise the exercise of administrative discretion" in implementing the Act, but to ensure that the constitutional limits on congressional allocation of federal power are respected in the Act itself. This was a proper subject of review.

In short, the nondelegation doctrine requires this Court, if possible, to adopt a constitutional construction of section 109 of the Clean Air Act that ensures that the EPA's discretion is not arbitrary, given the statutory context of deep scientific uncertainty about health effects and unparalleled administrative power over the States and the national economy. *Lead Industries* cannot fit that bill: it authorizes the Administrator to rely solely upon scientific evidence even when science is indeterminate, thus leaving the Administrator free to set risk levels without any constraining principle.

II. THE *LEAD INDUSTRIES* INTERPRETATION OF SECTION 109 DOES NOT PROVIDE AN INTELLIGIBLE PRINCIPLE CONSTRAINING THE ADMINISTRATOR'S POWER.

A. Under A Proper Interpretation Of Section 109, The Principle Of Cost-Effectiveness Constrains The Administrator's Discretion When The Scientific Evidence Is Indeterminate.

Properly interpreted, section 109 of the Clean Air Act is clearly constitutional. As described more fully in our prior brief, Congress legislated "as far as was reasonably practicable," *Buttfield*, 192 U.S. at 496, in a scientifically complex area of environmental regulation, and channeled the Administrator's discretion by providing principled constraints that permit the courts to "ascertain whether the will of Congress has been obeyed," *Yakus*, 321 U.S. at 426. For pollutants emitted from numerous or diverse sources that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7408(a)(1)(A), the Administrator, among other things, sets primary NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on [air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health." *Id.* § 7409(b)(1).

Congress intended the Administrator's judgment to be based on science to the extent possible: not only does section 109 require the Administrator to base the standard on air-quality criteria that "shall accurately reflect the latest scientific knowledge" regarding pollution effects, *id.* § 7408(a)(2), but it also authorizes "an independent scientific review committee," CASAC, to advise the Administrator on the establishment and revision of NAAQS, *id.* § 7409(d)(2)(A)-(B).

As noted above, science cannot alone guide the Administrator in her judgment. Recognizing the inherent indeterminacy of science about public health risks from pollution, and intending standards that would be "preventative or precautionary," H.R. Rep. No. 95-294, at 49 (1977), Congress directed the Administrator to "allow[] an adequate margin of safety" to account for scientific uncertainty in making a "judgment" about what is "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Congress did not forbid the Administrator to consider any factor relevant to inform her judgment as to what was "adequate" or "requisite"—and certainly did not preclude consideration of cost/benefit balancing, which is fundamental to traditional concepts of environmental risk management, Hatch/Bliley Br. 20-23, and of "protect[ing] the public health," see Br. for Cross-Pet'rs 37-43. To the contrary, Congress directed the Administrator to gather "information on air pollution techniques" that "shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology," 42 U.S.C. § 7408(b)(1), and to publish this information along with the air-quality criteria prior to the proposal of a new or revised NAAQS, *id.* § 7409(a)(2). Congress further required CASAC to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards,"

id. § 7409(d)(2)(C)(iv),[13] and required the Administrator to explain any significant departure from "pertinent findings, recommendations, and comments" of CASAC and the National Academy of Sciences, *id.* § 7607(d)(3). The Administrator also must conduct cost-benefit analysis of the NAAQS. *Id.* § 7612(a)(1).[14]

The regulatory scheme essentially replicates that of the Air Quality Act of 1967, except that the authority to set air-quality standards is now vested in EPA rather than the States: standards must be set at or below the level at which science reflected in the air-quality criteria shows dangers to public health, but, in the face of scientific uncertainty, the ultimate standard would reflect a socioeconomic judgment as to what risk levels are tolerable. See Hatch/Bliley Br. 15-18. Thus, scientific evidence of a significant risk of danger to the public health, and, to the extent science is uncertain, the cost-effectiveness of alternative standards, are the intelligible principles that constrain the Administrator's discretion.

Bound by *Lead Industries*, the court of appeals could not adopt this interpretation, Pet. App. 15a, and thus was compelled to declare unconstitutional the Administrator's construction (which itself was tethered to *Lead Industries*).

---

[13] Despite the obvious intent of Congress, the court below accepted the Government's argument that information gathered in section 109(d)(2)(C) may not be used in setting NAAQS. Pet. App. 21a. Not only does that argument have no basis in text, but EPA does not follow it. Indeed, it explicitly relied on evidence gathered under subsection (C)(iii)—namely, the proportion of pollutant concentrations that is anthropogenic—in setting the ozone NAAQS. *Ozone Rule*, 62 Fed. Reg. at 38,868. Having done so, it cannot plausibly argue that it is barred from considering the cost data gathered under subsection (C)(iv) of that statute.

[14] EPA also considers costs in apportioning burdens among states pursuant to its authority to order upwind states to curtail emissions that contribute significantly to nonattainment by downwind states—a risk-management task that cannot be divorced from the setting of NAAQS. *See* Hatch/Bliley Br. 24-25.

Id. at 11a. The interpretation discussed above is not only the most natural reading of the Act's text, structure, and history, but it is also compelled by the doctrine of avoidance of constitutional questions: only cost-effectiveness and the balancing of benefits and costs are intelligible principles to guide the Administrator in choosing among alternatives that protect the public in varying degrees. Cf. *id.* at 14a-15a (cost-benefit analysis provides determinacy to avoid nondelegation problems); *International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991) (same). By contrast, the Government's approach of simply identifying evidentiary factors for consideration does not provide any comparative standard whatsoever, and thus arrogates to the Administrator an impermissible power, legislative in nature, to draw lines on an arbitrary basis.

B. The *Lead Industries* Rule That EPA May Only Rely Upon Scientific Factors Even When Science Is Indeterminate Violates Nondelegation Principles.

Drawing on some of the same statutory provisions discussed above, the Government and its supporters attempt to defend *Lead Industries* by arguing that there are intelligible principles that bind the Administrator, even if cost-effectiveness may not be considered. Their view, summarized, is that EPA has a statutory mandate to "protect the public health" by setting standards, after consideration of air-quality criteria and CASAC advice and adding a margin of safety, that protect sensitive populations from adverse health effects linked to the presence of a criteria pollutant in the outside air. U.S. Br. 22-25; Mass. Br. 28-34. This, they claim, is specific enough to pass constitutional muster.

Erroneous as a matter of statutory interpretation, this construction cannot provide the "primary standard," *Buttfield*, 192 U.S. at 496, against which EPA's actions can be

measured. The reason is that EPA has acknowledged that section 109 does not require the NAAQS to eliminate all adverse health effects (*i.e.*, achieve zero-risk). See, *e.g.*, *PM Rule*, 62 Fed. Reg. at 38,653; *Ozone Rule*, 62 Fed. Reg. at 38,857. In other words, the purported "primary standard" of protecting against adverse health effects upon sensitive populations does not suggest any intelligible principle to guide the Administrator in deciding *which* adverse health effects to prevent, or *which* populations to protect. Moreover, all the statutory procedures on which their briefs rely only relate to that part of the NAAQS process that is not in controversy: namely, the congressional directive that NAAQS be based on the best science possible. The procedures do not address the issue of how the Administrator makes the highly consequential choice among alternative risk levels when the science is indeterminate, and when adverse health effects would still occur even under the alternatives selected. The lengthy recounting of statutory procedures in the opposing briefs thus should not deflect this Court's attention from the issue at hand: namely, as the court of appeals rightly identified it, what "intelligible principle" controls the discretion of the Administrator in choosing any risk level above zero when science does not provide the answer. Pet. App. 6a.

On this score, the Administrator offers only a series of so-called decisional factors, and it is on these factors that the validity of *Lead Industries* turns. The Administrator identifies those factors as "the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." *Ozone Rule*, 62 Fed. Reg. at 38,883. But, those factors (though certainly relevant) are not "determinate criteria for drawing lines" and "do not themselves speak to the issue of degree." Pet. App. 6a, 7a. More fundamentally, in simply identifying decisional factors, the Administrator has failed in her obligation "to

apply *some* limiting standard, rationally related to the goals of the Act." *Iowa Utils. Bd.*, 525 U.S. at 388.

The nub of the issue is this: Because Congress did not expect NAAQS to eliminate all health risks, as EPA acknowledges, the setting of NAAQS is essentially an exercise in the allocation of environmental health protections and the management of risk. See Pet. App. 16a-17a (suggesting that EPA could derive intelligible principle from Oregon plan for rationing health care); Breyer, *supra*, at 18-19, 23 (discussing impact of finite resources on risk regulation). Put another way, EPA has set standards at levels that will protect some populations from health impairment, but not others. The only reason for drawing such lines is economic, in the broad sense of that word: namely, tighter standards are progressively expensive, and approaching zero risk is counter-productive because it diverts society's resources away from other needs. See, *e.g.*, H.R. Rep. No. 95-294, at 127 (1977) (rejecting argument that NAAQS could be set at a zero-risk level because such an approach "ignores all economic and social consequences and is impractical"). Cost-effectiveness is an intelligible principle by which to allocate health protection: if the scientific basis for choosing among various standards is indeterminate, the Administrator may select a standard because its benefits for the public are in her judgment reasonably commensurate with the costs to society.[15]

The medical-evidence decisional factors forwarded by the Administrator, by contrast, provide no principled basis for balancing and line-drawing. They are not rationally related to any coherent standard for allocating public health protections, nor do they fully "tak[e] into account the objectives of the

[15] *See* Alon Rosenthal et al., "*Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*," 19 Ecology L.Q. 269, 336 (1992) (cost-effectiveness is a means "to maximize public health protection through the rationing of finite resources").

Act," *Iowa Utilities Board*, 525 U.S. at 392, which are to induce "reasonable Federal, State, and local governmental actions," 42 U.S.C. § 7401(c), to "promote the public health and welfare and the productive capacity of [the Nation's] population," *id.* § 7401(b)(1). EPA's exclusive reliance on such factors is feckless when the judgment regarding rationing of health protection is not merely technical, but social, political, and economic, see Jasanoff, *supra*, at 232. Indeed, no rational regulator would forbear from protecting any population—or any individual—from even a health effect of moderate severity, no matter the certainty of the evidence, if the cost of doing so were comparatively trivial. Breyer, *supra*, at 65; Cass R. Sunstein, *Is The Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 308 (1999). Thus, in setting NAAQS at a certain level of protection above zero (achievable) risk, the Administrator has necessarily determined (without saying) that additional protections are not worth it.

The Government will no doubt claim in reply that broadening the factors EPA may consider to include costs necessarily expands its discretion, and thus heightens any nondelegation problems. That is not so, and this Court directly rejected such an argument in the *NBC* case, where it refused to narrow the Federal Communications Commission's authority under the "public interest" standard to the consideration of "technological objections to the granting of a license." 319 U.S. at 216. Such factors, the Court held, would be indeterminate in the context of radio regulation, given the evident purposes of the Communications Act of benefiting the public at large: "If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station?" *Id.* at 216-17.

The same is true here; just as withdrawing relevant factors from the FCC's consideration would thwart protection of "public interest," so too would withdrawing consideration of costs and other regulatory effects of a NAAQS unduly limit the Administrator in achieving her mandate of protecting the public health.[16] Permitting the Administrator to consider costs does not increase her discretion; it simply prevents arbitrariness, and administrative charades, in selecting among alternative standards, and tethers her decisionmaking to statutory purposes, which is the overriding purpose of the nondelegation doctrine. And it promotes the accountability that is the animating reason for the nondelegation doctrine, see *Loving*, 517 U.S. at 757-58, by permitting meaningful judicial, congressional and public scrutiny of these enormously important administrative decisions.

By identifying indeterminate decisional factors as the only limits on its authority, EPA has arrogated to itself the arbitrary power to drive health risks all the way down to zero,

[16] Because "requisite to protect the public health" is the ultimate statutory standard, we emphasize that cost-effectiveness is not a straitjacket, and does not demand that the Administrator set the NAAQS at the precise point where benefits exceed costs. As the Government rightly contends, the nondelegation doctrine does not require quantitative "rules of thumb," *American Power & Light*, 329 U.S. at 106, and "[t]he difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide." *Sunshine Anthracite Coal*, 310 U.S. at 399-400. Cost-effectiveness is a decisional principle that can be weighed against the extent and uncertainty of health risks to ensure administrative judgment that rationally protects public health, and that would then be reviewable by courts under the arbitrary and capricious standard. It is a more flexible standard than other possible constraining principles: *e.g.*, a mandate for the Administrator to reduce health risks to the level of technological or economic feasibility. Here, the Administrator has the latitude to go beyond feasibility constraints if the public health benefits warrant, *see Union Electric Co.* v. *EPA*, 427 U.S. 246, 257 (1976) (discussing technology-forcing character of Act), or to stop short of feasibility if the anticipated health benefits are not worth the cost.

even if that would bring the entire economy to its knees. In charging EPA with setting standards "requisite to protect the public health," Congress cannot be presumed to have given EPA the unfettered power to impose mandates that may be wholly inimical to the public interest.[17]

Thus, just as this Court in *Iowa Utilities Board* interpreted the local competition provisions of the Telecommunications Act of 1996 to "requir[e] the [FCC] to determine on a rational basis *which* network elements must be made available [to competitors], taking into account the objectives of the Act," 525 U.S. at 391-92, so too this Court should interpret section 109 to require EPA to determine on a rational basis *which* populations will be protected in setting NAAQS. Because the allocation of public health protections in managing risks is, in the face of scientific uncertainty, a socioeconomic and political decision, the consideration of economic factors must play some part in any rational decisionmaking by EPA. *Lead*

[17] This Court has recognized that the resources of American society for achieving important social objectives "are limited, and therefore precious; they cannot be left to wasteful use without detriment to the public interest." *NBC*, 319 U.S. at 216, 217. Finite resources are an inescapable fact of environmental regulation, just as they are in the field of health care, where priority-setting is inevitable. *See, e.g.*, Leonard M. Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. Pa. L. Rev. 1597 (1992). The aggregate (*i.e.*, "political") level of expenditures American citizens, governments, and businesses make available toward public health is a precious resource. Accordingly, "*comparative* considerations as to the [benefits] to be rendered," *NBC*, 319 U.S. at 217 (emphasis added), must govern here. EPA thus sheds a crucial limit on its administrative power by failing to compare the significance of health risks—as in *Industrial Union*—and the relative "wasteful[ness]" of regulatory options—as in *NBC*. The President understood this in issuing the cost limitations on implementation of the NAAQS, but his effort to effect a cure was neither timely nor legally sufficient. Hatch-Bliley Br. 27-30. EPA had to apply the requisite limiting principles when it set the NAAQS.

Industries, by excluding such considerations, offers in their place nothing but radical indeterminacy and unconstrained discretion on the part of the Administrator.

C. The Arbitrariness Of The *Lead Industries* Rule Is Evident In The PM And Ozone Rulemakings.

The incoherence of the decisional factors that the Government claims are "intelligible principles" is manifest in the PM and ozone rulemakings. This incoherence is not the product of the Administrator's abuse of a proper discretion, but of a statutory misconstruction of the Act that yields no standards rationally related to the statutory task of setting NAAQS.

1. *PM Rulemaking*

In the PM rulemaking, the Administrator applied the decisional factors and purported to have set the $PM_{2.5}$ standard by relying on studies with "statistical significance to the 95% confidence level." U.S. Br. 32. According to the Government, the Administrator picked the lowest concentration at which an epidemiological study showed a statistically significant correlation between PM and an adverse health effect, and added a margin of safety. *Id.* at 32-33.

If this were so, it would be about as arbitrary an approach to multibillion-dollar decisions regarding the public health as could be imagined. As an initial matter, it is at least ironic that EPA is trumpeting statistical significance as the dispositive factor even as it is criticized for downplaying that factor in other risk-management contexts. See Michael Gough & Steven Milloy, *EPA's Cancer Risk Guidelines: Guidance To Nowhere*, Cato Policy Analysis No. 263 (Nov. 12, 1996), *available at* http://www.cato.org/pubs/pas/pa-263.html. Furthermore, even if lack of statistical significance

may be reasonable grounds for rejecting a study,[18] it by no means follows that statistical significance can reasonably be the principal basis for regulatory action. First, statistical significance indicates that the results are not the product of chance, but it does not measure "the extent or importance of a difference" detected by the study or "the strength or importance of an association" between two variables (*e.g.*, a pollutant exposure and a health effect). David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Federal Judicial Ctr., *Reference Manual on Scientific Evidence* 331, 378-79 (1994). Second, statistical significance (which is often simply a function of sample size, *id.* at 379) assumes the validity of the study design and the randomness of the sampling, among other factors; worthless studies may generate statistically significant results. *USGS Site*, *supra*, at 1, 3-4. Finally, EPA's reliance on this single factor is absurd given its overall conclusion that the scientific evidence on PM is rife with "significant uncertainties," *PM Rule*, 62 Fed. Reg. at 38,655—including the fundamental uncertainty as to whether particles of a certain size are causing *any* health effects, or whether those detected result instead from other factors (such as a specific chemical agent). See Br. for Cross-Pet'rs at 13-15. No regulator worth her salt would make decisions on this basis, and it is doubtful the Administrator did so here. This is more likely yet another science charade—the invocation of technical jargon to support a decision made on other, undisclosed factors.[19]

---

[18] But *cf.* Douglas H. Johnson, *The Insignificance of Statistical Significance Testing*, 63 J. of Wildlife Mgmt. 763 (1999), *available at* http://www.npwrc.usgs.gov/resource/1999/statsig/stathyp.htm ("*USGS Site*") (discussing longstanding controversy among scientists over whether statistical significance has any utility in scientific research).

[19] It is noteworthy that EPA disregards good science when it conflicts with the agency's preferred policy, *see Chlorine Chemistry Council* v. *EPA*, 206 F.3d 1286, 1291 (D.C. Cir. 2000) (criticizing "EPA's disregard of its own scientific findings"); *Chemical Manufacturers Ass'n* v. *EPA*, 28

2. *Ozone Rulemaking*

The Government defends the ozone rulemaking with the *ipse dixit* that EPA "identified important and meaningful differences in the character of the scientific evidence regarding risks," U.S. Br. 33, but it is clear that EPA engaged in arbitrary linedrawing. For ozone, the evidence indicated that 41,000 children in nine urban areas would suffer moderate or severe pain on deep inspiration once or more per year at a concentration of .09 parts per million ("ppm"); 27,000 children would at the new NAAQS of .08 ppm; 22,000 would at .08 ppm with a slightly lower average daily maximum; and approximately 9,000 would at .07 ppm. Similarly, 97,000 children would suffer large lung-function decreases of at least 20% at .09 ppm; 58,000 at the new NAAQS of .08 ppm; 43,000 at .08 ppm with a slightly lower average daily maximum; and approximately 12,000 at .07 ppm.[20]

F.3d 1259, 1266 (D.C. Cir. 1994) (criticizing EPA's scientific " 'let-them-eat-cake' attitude" to the public it serves); *Flue-Cured Tobacco Cooperative Stabilization Corp.* v. *EPA*, 4 F. Supp. 2d 435, 456, 460 (M.D.N.C. 1998) (criticizing EPA for cherry-picking data and altering methodology to achieve statistical significance), but happily relies on bad science that may support favored policy outcomes. *See also* Phillip K. Howard, *The Death of Common Sense* 7 (1994) (noting instance where EPA set a rule that maximized cost without any corresponding benefit, and the counterproductive results of such regulation).

[20] *Ozone Rule*, 62 Fed. Reg. at 38,865; R.G. Whitfield, *A Probabilistic Assessment of Health Risks Associated With Short-Term Exposures to Tropospheric Ozone: A Supplement* 21-22 (Jan. 1997) (6 Ozone JA 2325, 2352-53) (prepared for EPA); National Ambient Air Quality Standards for Ozone; Proposed Decision, 61 Fed. Reg. 65,716, 65,725 (1996) (0.07 ppm). The figures used for the .08 and .09 ppm standards are drawn from EPA's final rule, which did not repeat the risk analysis for the 0.07 ppm alternative standard that was included in the proposed rule. While the original and final risk assessments used slightly different methodologies, they show roughly similar disparities in health effects. *See* 61 Fed. Reg. at 65,725.

On what basis did EPA decide to provide protection from severe pain on inspiration to an incremental 14,000 children by setting the NAAQS at 0.08 ppm, but not to another 18,000 by setting it one notch lower at 0.07 ppm? Why did EPA protect an incremental 39,000 (but not an additional 46,000) children from large lung-function decreases? EPA's decisional factors do not supply a standard—these are the *same* populations suffering the *same* health effects, estimated from the *same* data and models, with the *same* uncertainty for any concentration. The only rational, moral, and democratic reason why EPA would draw a line at .08 ppm and deny improved health to many thousands of people is that the massive expenditure of national resources required to drive ozone concentrations that low would be counterproductive for the overall health of the public.

Congress fully intended for the Administrator to consider the cost-effectiveness of alternative standards in the face of scientific uncertainty. "The language of the Act does not withdraw such a [consideration]" from the Administrator's judgment, "and there is no evidence that Congress did not mean its broad language to carry the authority it expresses." *NBC*, 319 U.S. at 218. As the court below acknowledged, Pet. App. 15a, cost-effectiveness of a precautionary standard is an intelligible principle where the scientific evidence is indeterminate—indeed, it is the generally accepted principle of risk management and line-drawing in the face of scientific uncertainty. See Hatch/Bliley Br. 7-8. Moreover, it is a principle which the judiciary can enforce to determine whether congressional will has been obeyed, *Yakus*, 321 U.S. at 426, and such considerations must be out in the open for the judiciary to determine whether the Administrator has substantially complied with the statute.[21]

---

[21] Judicial review is an indispensable concomitant of broad delegations by Congress, *see American Power & Light*, 329 U.S. at 105, and necessary to the proper implementation of the Clean Air Act. Contrary to

Lead Industries offends nondelegation principles; it gives EPA arbitrary unilateral power to overhaul the nation's environmental policy, and transform the nation's economy dramatically, without a congressional mandate or scientific imperative to do so. This Court should construe section 109 to permit the Administrator to consider the cost-effectiveness of alternative air-quality standards,[22] and this Court should adopt that interpretation to avoid serious questions about the statute's constitutionality.

CONCLUSION

On the grounds set forth above, the judgment below should be affirmed.

Respectfully submitted,

LLOYD N. CUTLER
C. BOYDEN GRAY
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C 20037
(202) 663-6000

CARTER G. PHILLIPS
ALAN CHARLES RAUL *
STEPHEN B. KINNAIRD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amici Curiae

September 11, 2000

* Counsel of Record

---

the Government's contentions, U.S. Br. 27, judicial review is more important, not less, when the agency engages in regulatory science. The principle of deference to agency scientific decisions established in *Baltimore Gas & Electric* v. *NRDC*, 462 U.S. 87, 103 (1983), is not to the contrary; it simply means that the court cannot substitute its judgment for that of the agency. Courts nonetheless still have an important role to ensure reliable regulatory science, similar to the gatekeeping function of trial courts recognized in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Here, if *Lead Industries* is set aside, a reviewing court could prevent EPA from withholding its scientific assumptions, papering over scientific uncertainties, and failing to consider all "the relevant factors." *Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Courts must be vigilant in unmasking science charades, wherein an agency dresses its unadorned policy choices in scientific garb.

[22] It is the function of this Court, not EPA, to interpret the statute to define intelligible principles. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), is inapposite to nondelegation issues. *Chevron* is premised on congressional intent to delegate rulemaking power to the agency. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1314 (2000); *Chevron*, 467 U.S. at 844-45. A delegated power cannot be invoked to supply the principles that make the very delegation constitutionally permissible. The Constitution requires that the limiting principle must come from the statute itself, as construed by the judiciary.

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

25

No. 99-1257

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, et al.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Respondents.

On A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN CROP PROTECTION ASSOCIATION, AMERICAN WOOD PRESERVERS INSTITUTE, CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, THE FERTILIZER INSTITUTE, INTERNATIONAL SANITARY SUPPLY ASSOCIATION, NATIONAL PEST MANAGEMENT ASSOCIATION, PROFESSIONAL LAWN CARE ASSOCIATION OF AMERICA, AND RISE (RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT) IN SUPPORT OF RESPONDENTS

HERBERT L. FENSTER*
LAWRENCE S. EBNER
MONICA A. AQUINO
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
**Counsel of Record for Amici Curiae*

BEST AVAILABLE COPY

36pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THIS COURT'S PRIOR NONDELEGATION PRECEDENTS DO NOT PROVIDE A REASONABLY CLEAR BASIS FOR DETERMINING WHEN CONGRESS HAS IMPROPERLY DELEGATED ITS LEGISLATIVE RESPONSIBILITIES 11

A. A Weak History For Three-Quarters Of A Century 11

B. A Tentative Effort Starting In 1980 15

C. The *Mistretta* Legacy 18

II. CONTEMPORARY REGULATORY COMPLEXITIES DO NOT REQUIRE ABANDONMENT OF CONSTITUTIONAL REQUIREMENTS FOR ENACTMENT OF REASONABLY PRECISE STATUTORY PRINCIPLES AND STANDARDS 19

III. NONDELEGATION IS NOT SUBSUMED

BY *CHEVRON* 24

IV. THE OVERTURNING OF § 109 OF THE CLEAN AIR ACT WOULD NOT DISRUPT THE NATION'S EFFORTS TO REGULATE AIR POLLUTION 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 12, 13, 14

American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) ("*Cotton Dust*")... 16, 17, 23, 28

American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) ("*American Trucking*") ..... *passim*

American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) ("*American Trucking Rehearing*")..... 8, 10, 25, 27

Bowsher v. Synar, 478 U.S. 714 (1986) 11

Buckley v. Valeo, 424 U.S. 1 (1976) 11

Chemical Mfrs. Ass'n v. EPA, 217 F.3d 861 (D.C. Cir. July 25, 2000) 29

Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) 10

Clinton v. New York, 524 U.S. 417 (1998) 18

Field v. Clark, 143 U.S. 649 (1892) 11

First American Discount Corp. v. Commodity Futures Trading Comm'n, No. 99-1098, 2000 WL 1099978 (D.C. Cir. Aug. 18, 2000) 28

INS v. Chadha, 462 U.S. 919 (1983) 11

Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) ("*Benzene*")..... 15, 23, 28

International Union, UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) 24

International Union v. OSHA, 37 F.3d 665 (1994) 26

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 7, 12

Lead Indus. Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 8, 22, 27

Mistretta v. United States, 488 U.S. 361 (1989) 13, 18, 20, 21

Morrison v. Olson, 487 U.S. 654 (1988) 11

National Cable Television Ass'n, Inc. v. U. S., 415 U.S. 352 (1974) 12

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 11, 29

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 12

Society of Plastics Industry, Inc. v. ICC, 955 F.2d 722 (D.C. Cir. 1992) 28

Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 11

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 14

STATUTES

Clean Air Act, 42 U.S.C. § 7401 *et seq.*
§ 109(b)(1)-(2), 42 U.S.C. § 7409(b)(1)-(2) 6, 9, 20

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* 15
§ 3(8), 29 U.S.C. § 652(8) 16
§ 6(b)(5), 29 U.S.C. § 655(b)(5) 16

MISCELLANEOUS

Scalia, "The Legislative Veto: A False Remedy for System Overload," *REG.*, Nov.-Dec. 1979 ..... 15, 23, 28

Scalia, "A Note on the Benzene Case," *REG.*, July-Aug. 1980 22

INTEREST OF *AMICI CURIAE*[1]

The American Crop Protection Association (ACPA) is a not-for-profit trade organization that represents the major manufacturers, formulators, and distributors of crop protection, pest control, and biotechnology products. ACPA member companies produce, sell, and distribute virtually all the scientific technology products used in crop production by American farmers.

The American Wood Preservers Institute (AWPI) is the national industry trade association representing the pressure-treated wood industry throughout the United States. Member companies are wood pressure treaters, preservative manufacturers, and supporting companies working to conserve forest resources, preserve the environment, and extend the life of wood products through the manufacture of pressure-treated wood.

The Chemical Specialties Manufacturers Association (CSMA) is a voluntary, nonprofit trade association composed of several hundred companies engaged in the manufacture, formulation, distribution and sale of non-agricultural pesticides, antimicrobials, detergents and cleaning compounds, industrial and automotive specialty chemicals and polishes, and floor maintenance products for household, institutional, and industrial uses.

---

1 All parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici curiae* hereby affirm that no counsel for any party in this case authored any part of this brief, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Fertilizer Institute (TFI) is a voluntary, nonprofit trade association of the fertilizer industry. TFI's nearly 250 member companies manufacture over 90 percent of the domestically produced fertilizer. TFI's membership includes producers, manufacturers, distributors, transporters, and retail farm suppliers of fertilizers and fertilizer materials.

The International Sanitary Supply Association (ISSA) is a nonprofit trade association comprised of over 4,600 manufacturers and distributors of institutional and industrial cleaning and maintenance products. As such, the membership plays a key role in maintaining the sanitary and healthful conditions of institutional/industrial facilities such as day care centers, schools, hospitals, nursing homes, hotels, restaurants, and food processing plants.

The National Pest Management Association (NPMA) is a not-for-profit trade association that represents approximately 5,000 firms that are engaged in the business of providing structural pest management services to residential, commercial, and industrial customers, as well as companies that produce or distribute the products used by such firms.

The Professional Lawn Care Association of America (PLCAA) is an international association that promotes education, balanced legislation, and public awareness of the environmental and aesthetic benefits of turf and ornamentals. Its mission is "Growing Leaders" in the Green Industry. PLCAA represents more than 1,200 lawn and landscape companies, industry suppliers, government agencies, grounds managers, educators, and students in the United States, Canada, and other countries.

RISE (Responsible Industry for a Sound Environment) is the national association representing the

manufacturers, formulators, distributors, and other industry leaders involved with pesticide products used in turf, ornamental, pest control, aquatic and terrestrial vegetation management, and other nonfood/fiber applications.

Amici are trade associations whose members are directly affected by EPA's health, safety, and environmental standards, including those promulgated pursuant to § 109 of the Clean Air Act (CAA). Given that the Clean Air Act provides no certain course for determining how clean the air should be, *amici* focus on the constitutional nondelegation issue presented in this case. In particular, *amici* address the question of whether Congress has legislated with sufficient clarity and precision so that the Executive Branch can make decisions on such matters in order to fulfill a statutorily enunciated principle governing life and health.

SUMMARY OF ARGUMENT

A delegation to an Executive Branch agency to establish standards for particulate matter in our air that recites no more than "requisite to protect the public health" and "public welfare" is plainly unconstitutional. If that fact were not readily apparent, it certainly becomes so when it is seen that these meager terms, undefined and unexplained, enable an Executive Branch agency to write regulations over a range of possibilities that include deindustrialization of the nation on one extreme, and possibly tens of thousands of deaths and illnesses on the other.

This Court's jurisprudence provides little usable guidance in its precedent nondelegation cases to address the instant case. From this sparse case law we have no more than a series of terms including "intelligible principles," "standards," and "boundaries" for use as models to determine whether a provision of a statute inadequately communicates

the intentions of the legislative branch. These terms appear especially inadequate where the statutory provision is capable of producing profound changes in virtually all of our society.

It has become very readily apparent that Congress increasingly is using the legislative delegation device to avoid making hard choices and to pass to the two coordinate branches, issues which are too hot to handle. In no instance is this aspect of the problem more apparent than in the present case. CAA § 109 has been in effect for thirty years, the problems with its interpretation have been notorious for all that time, and no further explication has been received from the Legislative Branch; nor have the problems with its interpretation abated in all of that time notwithstanding many efforts at addressing these problems by the courts.

One overriding problem produced by this intended silence is the question of whether the economics of compliance shall be considered by the Environmental Protection Agency (EPA) in developing regulations. Twenty years ago, the D.C. Circuit prohibited such consideration. Yet, not only has it become readily apparent that rulemaking without such consideration is impossible, but the silence of Congress combined with this ruling has sent economic considerations underground. It is fair to note that the refusal of Congress to address the imperative need to consider cost benefit and economics more generally where health and welfare are unquestionably traded off, has become a generic nondelegation problem affecting a wide range of statutes, many of which have, as a result, wound up before the courts, including this Court.

It is not imperative of our larger and more complex society that Congress must yield its legislative responsibilities to the other two coordinate branches. The movement in that direction ultimately undermines a core

requirement of separation of powers. This Court has long held that Congress can call upon many assets, including those appearing for purposes of petitioning and, of course, those available to the Executive Branch, in this case, the EPA. Thus, the very parties before this Court (including the many *amici*), and the very arguments being made here, to the court below and to EPA itself, should have been made to Congress, which then should have provided the Executive Branch with meaningful guidance for these critical decisions.

EPA should not be permitted to substitute its supposition for the enunciated intent of Congress. The courts should not be imposed upon to complete the making of legislation requiring choices seen as politically too hard for the nation's elected representatives. This case contains sufficiently far reaching and profound requirements for the Court to enunciate the violation of the nondelegation doctrine. The decision should be reversed, the provision declared unconstitutional, and Congress given the opportunity, after thirty years, to enunciate its objectives in terms sufficiently precise to enable regulation and not lawmaking by EPA.

ARGUMENT

We limit the address of this brief to the issue of nondelegation, and we limit our factual setting to particulate matter (PM). The first limitation accords with the determination by the Court on the planned "two rounds" of briefing. The second limitation is self-imposed. While these *amici* take some issue with the posture of the ozone standards and the D.C. Circuit's decisions on that subject, it is the view of these *amici* that the dominant issue, subsuming all others in the case, is nondelegation.

When Congress passed the CAA in 1970, it included as § 109(b)(1)-(2) a provision requiring EPA to create primary air standards, including those for PM and ozone "requisite to protect the public health" with "an adequate margin of safety," and secondary air standards "requisite to protect the public welfare." 42 U.S.C. § 7409(b)(1)-(2). While the subject is contested, it is quite clear that Congress - literally - did nothing to define what it meant by these terms. As a result, over the succeeding thirty years, EPA, industry, and public interest groups have struggled to understand just what these terms mean. This was no easy task because, unlike parallel pollution abatement and safety requirements imposed by legislation of the same vintage, these requirements transcended anything that was site or industry specific and portended wholesale changes to be imposed in every corner of American life. The reach of "public health" and "public welfare" in this case is what casts the case as a nondelegation issue.

EPA first issued rules under these provisions in 1971. They were revised for ozone in 1979 and for PM in 1987. This case is the product of further revisions to both, originally begun in the early 1990s. It is uncontested that there has been a huge leap forward over the thirty years - and at an accelerating rate - in our ability to know what the pollutants are, what are their sources, the extent of their presence in our ambient air, and the risks to human well-being. Similarly we have experienced considerable advances in our ability to curtail these risks from many, if not all, of their sources. Not only does the CAA require renewed inquiries and rulemaking, but it is certainly provident for EPA to conduct the exercise that gives rise to this case.

In July 1997, EPA issued its final rules revising the primary and secondary National Ambient Air Quality Standards (NAAQS) for PM, and the instant case was

initiated by several petitioners. Certain of the petitioners seemed to take the position that the interpretation placed on § 109 by EPA had resulted in a violation of the nondelegation doctrine, and they sought to have the D.C. Circuit vacate the PM levels and remand them to EPA. *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) ("*American Trucking*").

Citing the test enunciated by Chief Justice Taft in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), the court of appeals agreed with these petitioners:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle.

American Trucking, 175 F.3d at 1034. One may well ask how the court reached a "reasonableness" determination in the absence of "intelligible principles."

This conclusion by the court came after it had given EPA the opportunity in briefing and in argument to enunciate such a principle. EPA then petitioned for rehearing and for rehearing en banc. The former was granted in part and the latter was denied. *American Trucking Ass'ns, Inc. v. EPA*, 195 F.3d 4, 6 (D.C. Cir. 1999) ("*American Trucking Rehearing*"). In granting, in part, the petition for rehearing, the Circuit refused to modify its holding that the interpretation by EPA had created a potential violation of the

nondelegation doctrine, noting that, finally, EPA counsel had asserted what they believed to be an intelligible principle, but that whether it was indeed so would depend on its application in further determinations of NAAQS. *Id.* at 6-7. Thus, after multiple rounds of briefing and argument, it appears that the status of the case, short of this Court's determination, is that the Circuit has found there to be no articulation of an "intelligible principle" on which to base the standards issued, but only such a principle asserted by EPA counsel in its briefing and argument; no coupling of such a principle to the standards issued; and, as the Circuit noted, no such principle "apparent from the statute" itself. *Id.* at 6 (citing *American Trucking,* 175 F.3d at 1034).

The Round One briefing when considered with the Circuit decision reveals the dimension of this case. First, although given little attention other then by the Cross-Petitioners, the Circuit did indeed rely on its earlier decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*") to predicate its decision here on the notion that § 109 could not consider cost factors because none were implicated in the language of the provision.[2] The implications of this approach dictate that only health may be considered in setting NAAQS. Supporting this approach, one of the briefing parties noted that

---

2 *American Trucking*, 175 F.3d at 1038 ("Cost-benefit analysis ... is not available under decisions of this court. Our cases read § 109(b)(1) as barring EPA from considering any other factor other than 'health effects relating to pollutants in the air.' " (citations omitted)).

> EPA has estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by PARTIAL attainment of the new standards.[3]

Since PMs are thought to be "non-threshold pollutants" (*American Trucking*, 175 F.3d at 1034), it would appear that this camp could advocate that § 109(b)(1)-(2) compels protection of "public health" and "public welfare" by the curtailment of all or virtually all these deaths and illnesses. 42 U.S.C. § 7409(b)(1)-(2). This is an approach which has been characterized as calling for the "de-industrialization" of the United States. *American Trucking*, 175 F.3d at 1038 n.4. Arrayed against this approach is much of industry taking the position that *Lead Industries* is wrong and that if this Court will but overturn that decision, EPA would be free to consider the economic impact of more stringent regulation and consider too the cost benefit issues which they have raised. *See, e.g.,* Brief for Cross-Petitioners at 27, *et seq.*

There is little doubt, assuming as we do the validity of the premises of the competing parties, that this case literally concerns life and death issues: To what extent is EPA to determine standards on the basis of who shall live, who shall

---

3 Brief of Respondent American Lung Association in Support of Petitioner at 2 (citing Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486).

die, who shall be well, and who shall suffer respiratory-related illnesses? The nondelegation issue presented by this case then is whether Congress has legislated with sufficient clarity and precision that the Executive Branch can make decisions on such matters to fulfill a statutorily enunciated, intelligible principle governing life and health. The answer is plainly in the negative.

The subsidiary issues concern just what to do about this problem. The Circuit had two answers: send the case back to the Executive Branch agency for an explication of the principles on which THEY relied, and treat the case as a *Chevron*[4] II problem to be solved as though the statute is merely ambiguous and can be rationalized with the assistance of the agency. *American Trucking*, 175 F.3d at 1033; *American Trucking Rehearing*, 195 F.3d at 8.

I. THIS COURT'S PRIOR NONDELEGATION PRECEDENTS DO NOT PROVIDE A REASONABLY CLEAR BASIS FOR DETERMINING WHEN CONGRESS HAS IMPROPERLY DELEGATED ITS LEGISLATIVE RESPONSIBILITIES

A. A Weak History For Three-Quarters Of A Century

4 *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue," the Court must determine [under step two of the *Chevron* test] whether the agency's interpretation "is based on a permissible construction of the statute.")

The jurisprudence of this Court on the subject of nondelegation recognizes that it is a subset of separation of powers,[5] and its decisions generally take on one of two characteristics. They either represent the allegedly improper delegation of a "function" which is reserved to a coordinate branch, or they represent delegations of lawmaking responsibilities in the guise of execution of the law; there is much overlap between the two. Function delegation issues such as those presented by *Morrison v. Olson*, 487 U.S. 654 (1988), *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U.S. 50 (1982), and *Buckley v. Valeo*, 424 U.S. 1 (1976), are not at issue here. They are presented with sufficient frequency so that a reasonable pattern can be ascertained.

This case presents issues of delegation of legislative responsibilities in the guise of execution, and such cases are relatively rare. In the Twentieth Century, there have been remarkably few such decisions and they have provided no particularly useful guiding principles. Oft quoted, but of dubious value, is the penultimate statement in *J.W. Hampton* that Congress must "lay down by legislative act an intelligible principle to which the person or body ... is directed to conform." 276 U.S. at 409. But the notion of an "intelligible principle" has little meaning at all and, if manifested solely in simple adjectives and adverbs, generally cannot guide a regulatory agency in generating a set of regulations as complex as those directed to our ambient air.

Which is not to say that the notion has failed to receive at least some elaboration. It is recognized, however,

5 *Field v. Clark*, 143 U.S. 649 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

that such elaboration has not built an effective set of standards governing the conduct of Congress in its lawmaking. *National Cable Television Ass'n, Inc. v. U. S.*, 415 U.S. 352, 352-353 (1974) (Marshall, J., concurring in No. 72-1162, & dissenting in No. 72-948). We had two such decisions of New Deal vintage. In the first, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), the application of the NIRA was rejected because Congress had established "no criterion to govern the President's course...." Two years later, the Court again struck down the application of the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Chief Justice Hughes writing in that case noted:

> We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly.... [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability, which will enable it to perform its function in *laying down policies* and *establishing standards*, while leaving to selected instrumentalities the making of *subordinate rules within prescribed limits* and the determination of facts to which the policy as declared by the legislature is to apply.[6]

---

6 It would have been possible for the courts thereafter to employ these terms prescribed by the Chief Justice to delineate more precisely the "policies," "standards," and "prescribed limits"
(Footnote continued on next page)

Id. at 529-30 (emphasis added). Justice Cardozo, concurring, differentiated between "codes" the objectives of which are to eliminate abuses and those involving the "planning of improvements." *Id.* at 552. Delegation of the former, he noted "is borne of the necessities of the occasion." *Id.* As to the latter, however, he voiced a much more restrictive approach to what may be delegated, having noted that the use of such devices was on the increase (in 1935):

> In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything Congress may do within the limits of the Commerce Clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer.

Id. These decisions were followed by a seemingly long hiatus during which they were cast into a limbo borne of the

---

(Footnote continued from previous page)
which needed to be embodied in legislation, but there was no such elaboration until *Mistretta v. United States*, 488 U.S. 361 (1989), when this Court took up the term "boundaries." *Id.* at 373 (citations omitted).

crisis times of their writing. In this period, the complexities of governance grew exponentially as did the temptation of Congress to delegate its functions to the Executive Branch. The courts, however, were reticent about intervening in this process and therefore, we can "skip" to the 1980s with the brief stop at Justice Frankfurter's concurring observation in 1952 that:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952).

The admonitions of Justices Cardozo and Frankfurter came, apparently, in a period during which war, followed by huge economic growth, followed by acts of environmental contrition (among others) had so overloaded the flow of legislation and growth of bureaucracies that when this Court finally "got back" to the subject, it would seem that retrieving control was either impossible or unwise. Then Professor Antonin Scalia, in 1979, commented on this problem in the context of the growing practice of "legislative veto" (some three years before this Court's decision in *Chadha*) noting the expanse of the delegations of legislative authority that had occurred over the preceding fifty years. Scalia, "The Legislative Veto: A False Remedy for System Overload," *REG.*, Nov.-Dec. 1979, 19 ("Scalia, Legislative Veto"). He commented that delegation devices, with the supposed restraints of later oversight by Congress were, in many instances, enabling the legislative branch to preserve "control

while relieving the people's representatives of the embarrassment of voting." *Id.* at 25.

B. A Tentative Effort Starting In 1980

Thus, the problem had transcended accretion or arrogation of power by the Legislative Branch and had entered the realm of cession by that branch either because it seemed not able to cope or because it had found a means to avoid hard decisions "too hot to handle." Scalia, Legislative Veto, at 24. It would lead Justice Rehnquist to comment in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) ("*Benzene*"):

> It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.

In 1980, and again in 1981, this Court confronted two cases arising out of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, the first, popularly known as "*Benzene,*" and the second, known as "*Cotton Dust,*" *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). In those two decisions, we saw the product of fifty years of Executive Branch growth and the seeming uncertainty about how to treat the increasing expansion of legislative delegation practices using no more coherent "intelligible principles" then the insertion of vague, multi-meaning adjectives and adverbs.

In *Benzene*, the Court had to deal with two provisions of the Act neither of which addressed where a health and safety standard was to begin or to end. Section 3.8 recited that the standards were to be those "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8). Section 6(b)(5) required the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). Missing from either of these phrases was any indication of whether - or the extent to which - the standard was to address the economics of its imposition. It was clear that this omission was not mere inadvertence on the part of Congress because the excruciating examination of all of the Justices writing demonstrated that the subject of economics had been well-understood in the lawmaking process.

The rather sophisticated question at law in *Benzene* then was whether, and if so how, the courts (and the Executive Branch) were to insert considerations of economics into this pristine language that, to all political intents and purposes, had no motives other then health and welfare. The plurality decision affords us no guidance for the future; only the assurance that the Executive Branch, and necessarily the courts, would be called upon again to make these difficult legislative decisions.

Indeed, a year later this very statute and the same phrases were revisited by this Court in *Cotton Dust*. Now the Court was confronted with the need to interpret the word "feasible" to squeeze out of it at least a meaning that would enable a consideration of whether some semblance of the affected industry would survive. *Cotton Dust*, 452 U.S. at 508-511. And then the Court had to consider the further implications of whether economic address could include the

more esoteric consideration of a cost benefit analysis. There can be little doubt that the Court, being unelected, had been imposed upon to make the hard choices that Congress had refused directly to address. As he had in *Benzene*, Justice Rehnquist, now joined by Chief Justice Burger, dissented noting, *inter alia*:

> I am convinced that the reason that Congress did not speak with greater "clarity" was because it could not. The words "to the extent feasible" were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit or prohibit the Secretary from engaging in a cost-benefit analysis, there would have been no bill for the President to sign.

Cotton Dust, 452 U.S. at 546. To this one might add that "therefore, hereafter, these difficult political, social and economic decisions will have to be made by the coordinate branch most widely separated from the voting public."

C. The *Mistretta* Legacy

After these two decisions, there have been no significant statements from this Court on the subject of legislative delegation in the guise of execution with the exception of *Mistretta v. United States*, 488 U.S. 361 (1989). That case presented both legislation delegation issues and function delegation issues. As to the former, this Court found that there had been sufficient standards and principles enunciated to guide the Sentencing Commission and that there was therefore no unconstitutional delegation. *Mistretta*,

488 U.S. at 412. The dissent agreed that there were adequate principles and standards present in the law, but disagreed with the conclusion that there was therefore no unconstitutional delegation. This was because the degree of authority delegated was "excessive," thus creating a legislative substructure not intended by the Constitution. *Id.* at 419.

This cession of hard choices too hot to handle, is not within the comprehension of our Constitution. Noting a similar abandonment of an unpopular task by Congress, Justice Kennedy, concurring in *Clinton v. New York*, 524 U.S. 417, 451-52 (1998) (citations omitted), stated:

> It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow... Abdication of responsibility is not part of the constitutional design.

The decisions in sum, including those that are interspersed with those just noted, provide little or no guidance for the consideration of the instant case. This is not the product of the lack of sharp lines between what manner or degree of delegation will or will not pass muster, so much as

a seeming acquiescence in the congressional process of leaving politically sensitive and complex issues to a coordinate body. In the instant case, we have the specter of the agency and the courts being called upon to decide - on no basis ever articulated by Congress - who shall live, who shall die, who shall be well and who shall not. We have a decision below that frames no instruction or guidance on the economics of the provision in question, although there is no doubt whatsoever that some must exist, lest we return to an agrarian society. Absent the intervention of this Court, the Article II and Article III branches will proceed to do the work of the Article I branch under a court-imposed structure that institutionalizes delegation of legislative functions.

II. CONTEMPORARY REGULATORY COMPLEXITIES DO NOT REQUIRE ABANDONMENT OF CONSTITUTIONAL REQUIREMENTS FOR ENACTMENT OF REASONABLY PRECISE STATUTORY PRINCIPLES AND STANDARDS

This case raises nondelegation issues which are more pervasive than seen in any prior case. Not only are more Americans affected by the outcome of this case than by any previously decided, but the impact on their lives extends far beyond that possible in any prior case of this kind considered by this Court. This is not a single product case, such as *Benzene*. This is not a single industry case such as *Cotton Dust* or *Schechter Poultry*. This is not a case in which the economic fate of a relatively small portion of our population might be negatively impacted. This is a case where all Americans are "users" and "breathers."

The question then may be whether, under such circumstances, a greater duty of explication is owed by Congress than if a narrow band of society is implicated and

one who's fate may be, in substantial measure, left to experts, bureaucrats and administrators. We submit that the answer is clearly in the affirmative. Thirty years ago, Congress had a duty to say more than that regulations should issue which are "requisite to protect" the "public health" and "welfare." 42 U.S.C. § 7409(b)(1)-(2). And if Congress then had no particularized information on which to base anything more definitive, it certainly can do better now. The intervening thirty years has produced a vast array of information on every conceivable subject relevant to decision-making under this statute; this much is made clear by the briefings and decision below and the briefing already presented to this Court.

In *Mistretta*, this Court stated that, in applying Justice Taft's "intelligible principle" test the Court's jurisprudence had been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372 (citations omitted).

Unquestionably a society consisting of almost three hundred million people, in fifty states, two hundred years after the beginning of the industrial revolution, having the daily potential of breathing unhealthful air is not susceptible to a Legislative Branch functioning as a monolith, without a synergistic relationship with the Executive Branch.

But this Court did not find itself, somehow, bound because of the growth of our society. Continuing, the *Mistretta* Court quoted *Panama Refining* stating: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Id.* (quoting *Panama Refining*, 293 U.S. at 421). Unquestionably, those "resources" include access not only to

those who petition their causes, but also the resources of the much larger and technically proficient Executive Branch.

There is simply no reason why legislation must proceed solely and singularly from the Legislative Branch with no advice and guidance from the Executive Branch that would enable reasonable specificity on such matters as the economics of the improvement of our ambient air. Knowing this plain truism, the *Mistretta* Court concluded on this subject: "Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Id.* at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

And therefore we must consider just what is meant by "boundaries," and whether the statute at issue contains such boundaries. We submit that the boundaries circumscribing Executive Branch action must take into consideration the nature of the impact of the act itself. Logically, workplace control over a ubiquitous chemical such as benzene may inherently suggest a relatively low degree of boundary description by Congress before commitment into the hands of an agency expert in workplace oversight and having access to all manner of technical advice on risks. Even there, however, the boundaries need to account for the question of whether, and the extent to which, the economics of control are to be considered and the very notion of economic considerations is certainly capable of manifestation in the words of the statute itself.

But if the universe of that which is to be legislated takes on the dimension of the ambient air, and if the objective is to ensure "health and welfare," we must expect something more of Congress than the unbounded use of those terms. To

do no more, given that we are controlling the air and the health of our entire population, we would come close to Professor Scalia's suggestion that the abandonment of a nondelegation doctrine might suggest that "Congress could presumably vote all powers to the President and adjourn." Scalia, "A Note on the Benzene Case," *REG.*, July-Aug. 1980, at 28. "Boundaries" must have a meaning that - in fact - avoids the very issues that are before this Court.

Here, the Circuit had previously imposed an absolute ban on consideration of the economics of air quality. *Lead Industries*, 647 F.2d at 1148. It did so in the absence of any language - or even words so suggestive as "feasibility" in § 109 of the Act: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." *American Trucking*, 175 F.3d at 1040 (citing *Lead Industries*, 647 F.2d at 1148).

"Why," one might ask? The answer seems to lie in the profound silence of Congress. Notwithstanding the arguments made to this Court in the First Round briefing, the reality is that Congress, with plain intent to avoid any implication that it was trading dollars for lives, simply stood mute, unquestionably knowing that the very controversy before this Court would play out over the succeeding years. *See, e.g.*, *Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring); *Cotton Dust*, 452 U.S. at 543 (Rehnquist, J., dissenting); Scalia, "Legislative Veto," at 24. And does this mean that our nation will be deindustrialized and return - at least - to Mr. Jefferson's agrarian society? The answer was left for decision, presumably, to EPA, an Executive Branch agency not even enjoying an official seat in the President's Cabinet.

Imperative also within the certain contemplation of the Congress was the fact that this legislation by omission would implicate the Article III branch as the ultimate arbiter of what Congress might have meant to do. And, indeed, the economics of clean air is now before this Court which presumably must decide whether and how to balance life against cost. In this connection, and not illogically, some of the briefs before this Court suggest that, notwithstanding the admonitions in *Lead Industries*, EPA has regularly engaged in what can be described as "closet economics" to avoid the thorough illogic of considering such regulations with deindustrialization as a required objective. *See, e.g.*, Brief for Cross-Petitioners at 43, *et seq.*

In the instant case, the D.C. Circuit then proceeded to build on what else was missing: "The principle EPA invokes for each increment in stringency ... that it is 'possible, but not certain' that health effects exist at that level ... could as easily, for any nonthreshold pollutant, justify a standard of zero." *American Trucking*, 175 F.3d at 1036. And, for contrast, the Court noted that, at the other pole, EPA might just as easily "justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952." *Id.* The remark was apt because, not only were there no boundaries even suggested for the economics of air quality, there were, more importantly, none suggested for the air itself. This meant that Congress had given EPA no political, social, or economic boundaries from which it could make any judgments. At this point the issue becomes quite clear: May Congress legislate with no greater specification of "boundaries" or "intelligible principles" the simple commandment to the Executive Branch that the air shall be made clean?

Is this all we should expect from Congress where so much is at stake? There has not - yet - been an evolution of

guidance from this Court which would conclusively answer this question. But it is very plain that Congress could have done precisely what the Circuit was required to do and what this Court is being asked to do - and with no fewer or poorer tools. The "Petitions" to this Court and the court below were petitions that should have gone to Congress. It is Congress, and not the courts, that should have made these terribly difficult decisions.

III. NONDELEGATION IS NOT SUBSUMED BY *CHEVRON*

Despite the D.C. Circuit's reliance upon *International Union, UAW v. OSHA* ("*Lockout/Tagout I*"), 938 F.2d 1310, 1313 (D.C. Cir. 1991), it is not entirely clear just why the court thought to send back to an Executive Branch agency a statute which it had found contained no "intelligible principle" let alone any "boundaries." The Circuit noted in its decision and again on rehearing:

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.

American Trucking, 175 F.3d at 1038 (citing *Lockout/Tagout I*, 938 F.2d at 1313); *American Trucking Rehearing*, 195 F.3d at 7 (citing *American Trucking*, 175 F.3d at 1038). The Circuit justified this approach stating:

> Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority.

American Trucking Rehearing, 195 F.3d at 8. Adding: "In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*." *Id.* (citing *Benzene*, 448 U.S. at 642, 646 (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding ... that significant risks are present," thereby finding the statute an intelligible principle).

We do not fathom how this transition from the nondelegation doctrine was made notwithstanding the explanation given. We can find no premise for this transition in *Benzene* itself; there is nothing therein to indicate that this Court was ready to abdicate an approach to separation of powers that has at least a 150-year vintage. Although some commentators have suggested that this may be a more practical approach, it is hardly one that has been even facially adopted by this Court.

Further, it is not particularly logical to commonalize the notion of an ambiguous meaning with the absence of any meaning at all. It is true that where there is at least a thread of an intent of Congress in words or phrases of a statute which may be tracked back to the legislative history or the setting of the lawmaking, the courts may, and probably

should, attempt to see if the thread leads to a result of substance.[7] But those circumstances do not represent the facts in this case, as is amply demonstrated by the remarkably attenuated attempts by all parties to attach essentially non-existent substance and vague analogies to the health and welfare language of § 109. In at least one particular context, it is most unlikely that the Circuit itself considered that a further search for reason would yield any new results. This, of course, has to do with the question of whether the economics of new standards were for consideration by EPA. That concept, as previously noted, had been rejected by the Circuit some twenty years earlier and, without exception, reinforced against every onslaught thereafter, including in the instant case. *American Trucking*, 175 F.3d at 1040; *Lead Industries*, 647 F.2d at 1148. In fact, it has been the conclusion of the Circuit that the provision is NOT ambiguous in this regard and that it clearly precludes consideration of the economics of compliance, at least under § 109. *American Trucking, supra*, at 1040.

Nor is it conceptually unreasonable for the Circuit to give the agency the opportunity to clarify its conclusions against the meaning of the statute in other regards, such as enunciating the point along the continuum of clean to dirty at which Congress intended the agency to light. But, as the Circuit itself noted, neither the original EPA documentation, nor the briefings twice over, nor the arguments made in the

---

7 In *International Union v. OSHA*, 37 F.3d 665 (1994), it took five years and two trips to the circuit for the agency to find sufficient threads to overcome a nondelegation determination; and at that, it was plainly a close call and required maximum "fudging" on whether intelligible principles permitted a cost-benefit analysis.

case (presumably, either by the agency or the petitioners or any *amici*) had accomplished that task. The Circuit noted after rehearing:

> Indeed, the EPA's briefs in each of these two cases contained the same four sentences assuring the court that the statute provides a principle without explaining what the agency understands that principle to be.
>
> * * *
>
> These sentences begged the key question about that intelligible principle: "What is it?"

American Trucking Rehearing, 195 F.3d at 7. And the case, as it arrives before this Court, has no better elucidation. There must be a time when the possibility of an ambiguity that can be clarified must give way to the greater likelihood that what is missing truly is simply not there. While no one would go so far as to suggest the imposition of the rule of *contra proferentum* against Congress, in the present factual setting, as we have previously noted, much more must be expected of the lawmaking body.

The application of *Chevron* to emasculate nondelegation is not an attractive approach to consideration of constitutionality of laws for another reason. That reason has to do with the disciplines which we are entitled to expect of the lawmaking body. We have noted the increasing commentary of the courts, including this one, and other writers in the field, to the effect that Congress is passing its too-hot-to-handle issues to its coordinate branches. *See, e.g., Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring); *Cotton*

Dust, 452 U.S. at 543 (Rehnquist, J., dissenting); Scalia, "Legislative Veto," at 24. If the guise of ambiguity and the application of *Chevron II* is allowed to trench this practice, what we have seen in this case, in *Benzene* and in others such as *Cotton Dust* will surely become an established practice of overwriting intentional political omissions in difficult legislation.

That just this problem is already emerging is suggested by the fact that even though *Chevron* was decided in 1984, there have been at least 45 D.C. Circuit cases requiring *Chevron II* examination since 1992. *See, e.g., First American Discount Corp. v. Commodity Futures Trading Comm'n*, No. 99-1098, 2000 WL 1099978, at *4 (D.C. Cir. Aug. 18, 2000) (most recent case to require *Chevron II* examination); *Society of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 727-729 (D.C. Cir. 1992) (first case in 1992 to require *Chevron II* examination).

As recently as July of this year, the same Circuit again had to visit the Clean Air Act under the *Chevron II* doctrine, in that case § 112(i)(3) to figure out, against a silent statute, whether requirements for expediting compliance could be imposed. *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000).

IV. THE OVERTURNING OF § 109 OF THE CLEAN AIR ACT WOULD NOT DISRUPT THE NATION'S EFFORTS TO REGULATE AIR POLLUTION

These *amici* have no interest in disrupting, delaying or otherwise making even more difficult the implementation and management of this complex and very important statute. They DO have a profound interest in knowing that they will be required to comply with an empowering law and rationally

law-based regulations that reflect the will of Congress. They have a further interest in knowing that their rights and opportunities of petition to that elected body will be requited by actual language in the law that sets forth intelligible principles, standards, and boundaries to guide EPA. We believe this provision of the law must be returned to its maker for such standards, principles and boundaries that enable implementation considering where, in the continuum of clean air they are to be and how the economics of compliance are to be addressed.

It is our further view that this Court is well able to fashion a means for this purpose which will impose no hardship on the American public. This Court can, of course, stay its judgment to enable remedial legislation. *See, Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88-89 (1982). And Congress certainly would not be writing on a clean slate devoid of criteria to guide its consideration. As we have previously noted, the Circuit decision and the very extensive briefings to this Court demonstrate that the universe of considerations is well-articulated already. Petition of these considerations should be before the Article I Branch on issues so fundamental and should not, in the first instance, be relegated to a regulatory agency.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should hold that the nondelegation principles of the Constitution have been violated by the absence from § 109 of intelligible principles, standards, and boundaries by which EPA may reasonably effectuate a regulatory process and that the provision is therefore unconstitutional.

DATED: September 11, 2000

Respectfully submitted,

Herbert L. Fenster*
Lawrence S. Ebner
Monica A. Aquino
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
*Counsel of Record for *Amici Curiae*

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.

PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF INTEL CORPORATION, ELECTRONIC INDUSTRIES ALLIANCE AND ARIZONA ASSOCIATION OF INDUSTRIES, IN SUPPORT OF RESPONDENTS APPALACHIAN POWER COMPANY, ET AL.

GREGORY S. SLATER
INTEL CORPORATION
5000 West Chandler Boulevard
Mail Stop CH-6 404
Chandler, AZ 85226-3699
(480) 554-4082

RICHARD P. BRESS*
JULIA A. HATCHER
CLAUDIA M. O'BRIEN
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

*Counsel of Record for the *Amici Curiae*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the comprehensive framework and long term program Congress enacted in 1990 to achieve attainment of the then-existing ozone national ambient air quality standard ("NAAQS") restricts EPA's general authority under other provisions of the Clean Air Act to implement a new and more protective ozone NAAQS until the prior standard is attained.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THIS CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. Everyone Agrees That The Revised NAAQS Cannot Be Implemented Under Subpart 2 6

II. If The Court Decides EPA Has Authority To Implement The Revised Ozone NAAQS Under Subpart 1, EPA Could Conceivably Have That Authority Only In Those Areas That Have Attained Compliance With The Current NAAQS Under Subpart 2 11

A. Congress Enacted Subpart 2 As A Detailed And Comprehensive Framework For Implementation Of The Ozone NAAQS 12

B. Simultaneous Implementation Of The Current And Revised Ozone NAAQS Would Conflict With The Plain Language Of The Statute And Would Nullify Subpart 2's Comprehensive And Reticulated Enforcement Scheme 15

1. Subpart 1 – By Its Clear Terms – Does Not Apply To Areas Governed By Attainment Dates Specified In Subpart 2 15

2. Simultaneous Implementation Of The Current And Revised NAAQS Would So Undermine The Purposes Of Subpart 2 As To Render Subpart 2 A Nullity 18

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **Page(s)**

American Petroleum Inst. v. United States EPA, 198 F.3d 275 (D.C. Cir. 2000) 8

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 10

American Trucking Ass'ns v. Browner, 175 F.3d 1027 (D.C. Cir. 1999) 19, 24

American Trucking Ass'ns v. Browner, 195 F.3d 4 (D.C. Cir. 1999) 6, 11, 17, 25

Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 17

FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000) 16, 17, 18

Griffin v. Oceanic Contractors. Inc., 458 U.S. 564 (1982) 10

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 18

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 24

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 24

United States v. An Article of Drug . . . Bacto-Unidisk, 394 U.S. 784 (1969) 16

TABLE OF AUTHORITIES

Page(s)

STATUTES

Clean Air Act ("CAA") § 107, 42 U.S.C. § 7407 19

Subpart 1 of Part D of Title I of the CAA §§ 171-179B, 42 U.S.C. §§ 7501-7509a 3, 6

Subpart 2 of Part D of Title I of the CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f 3, 6, 12

CAA § 172, 42 U.S.C. § 7502 ..... *passim*

CAA § 179, 42 U.S.C. § 7509 ..... 10, 24

CAA § 181, 42 U.S.C. § 7511 ..... *passim*

CAA § 182, 42 U.S.C. § 7511a 9, 13, 23

CAA § 185, 42 U.S.C. § 7511d 10

CAA § 186, 42 U.S.C. § 7512 22

Transportation Equity Act of the 21st Century, Pub. L. No. 105-178, §§ 6102(d), 6103(a), (b), 112 Stat. 107, (1998) 19

REGULATIONS

40 C.F.R. § 50.10(b) 7

40 C.F.R. § 50.4(a) 21

40 C.F.R. § 50.4(b) 21

40 C.F.R. § 50.8(a)(1) 21, 22

40 C.F.R. § 50.8(a)(2) 21, 22

40 C.F.R. § 50.9(b) 19

40 C.F.R. Part 81 ..... 17, 21

40 C.F.R. § 81.300-.356 12

61 Fed. Reg. 25,566 (1996) 21

62 Fed. Reg. 38,856 (1997) 7, 8

LEGISLATIVE MATERIALS

H.R. Rep. No. 101-490 (1990), *reprinted in* Senate Comm. On Env't & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990, S. Print 103-38 (1993)* *("Legislative History")* ..... *passim*

S. Rep. No. 101-228 (1990) 20

OTHER AUTHORITY

EPA Office of Air Quality Planning & Standards, *Regulatory Impact Analysis for the Particular Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* (July 16, 1997) 22, 23

Memorandum from EPA Office of Air Quality Planning & Standards, *Proposed Implementation Guidance for the Revised Ozone and Particular Matter (PM) National Ambient Air Quality Standards (NAAQS) and the Regional Haze Program* (Nov. 17, 1998) 20

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.

PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF INTEL CORPORATION, ELECTRONIC INDUSTRIES ALLIANCE AND ARIZONA ASSOCIATION OF INDUSTRIES, IN SUPPORT OF RESPONDENTS APPALACHIAN POWER COMPANY, ET AL.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Intel Corporation, the Electronic Industries Alliance ("EIA"), and the Arizona Association of Industries ("AAI") advocate in rulemaking, policy-making and law-making venues to ensure that environmental programs are sufficiently protective, but do not impose undue impediments to operational flexibility. In particular, Intel has partnered with the Environmental Protection Agency ("EPA") and State agencies to develop permits that incorporate control measures and requirements in a manner that allows the flexibility to undertake the hundreds of process upgrades, advancements and innovations necessary

to compete in the global marketplace, control costs, maintain quality, meet corporate pollution prevention goals and satisfy new regulatory requirements. EIA represents its membership – comprised of technology-driven electronics companies – on air quality matters ranging from innovative programs to address emerging issues, such as climate change, to rulemakings under the Clean Air Act ("CAA" or "Act"), including the rulemaking at issue in this case. EIA's paramount goal has been to ensure the appropriate balance between environmental protection and operational flexibility. Finally, AAI has been a leader in promoting State adoption of ozone control measures ahead of schedule, but in a manner that does not significantly hamper growth. AAI members include many of Arizona's most prestigious manufacturing companies, from the State's largest private employers to small businesses. Most AAI members are located in Maricopa County, an area in Arizona classified as nonattainment for the current one-hour ozone standard.

To remain globally competitive, *amici* have a strong interest in ensuring that any revised ozone National Ambient Air Quality Standard ("NAAQS") is achievable and that its implementation is reasonable and predictable. Attainment of EPA's revised eight-hour NAAQS will impose substantial costs on the nation. EPA itself estimates that compliance with the new eight-hour ozone NAAQS will cost at least $9.6 billion per year *in addition to* the cost of compliance with the one-hour standard. Respondents Appalachian Power Co., et al. ("Industry Respondents") estimate the cost to be substantially higher. Moreover, EPA is seeking to implement the more stringent eight-hour standard immediately, even in areas that are still struggling to reach attainment with the one-hour standard. Much of this additional burden will be placed on industrial sources such as those of *amici*. *Amici* therefore have a substantial interest in ensuring that implementation of any revised NAAQS occurs in a reasonable, cost-effective manner consistent with the language and structure of the statute.

STATEMENT OF THIS CASE

Amici concur with and adopt the statement of the case proffered by Industry Respondents.

SUMMARY OF ARGUMENT

In 1990, Congress amended the Clean Air Act to create a detailed and comprehensive framework to address the failure of many areas of the country to attain compliance with the ozone NAAQS. The new framework, codified as Subpart 2 of Part D of Title I of the Act, classifies areas based on the severity of their ozone problem, provides milestones and deadlines for attainment, consequences for failure to meet those deadlines, and rules for continued maintenance of attainment levels. Despite Congress's express intent through Subpart 2 to provide a comprehensive regulatory framework for ozone attainment, EPA now asserts that it has the power simultaneously to enforce a revised (and more stringent) ozone standard, and to require attainment of this revised standard even before Congress directed that the old one be attained. EPA has no such authority. The regulations it has promulgated exceed EPA's statutory discretion, conflict facially with the plain language of the statute, and wholly undermine the purpose of the 1990 amendments.

1. Two different provisions of the Act theoretically could govern the implementation of EPA's revised ozone NAAQS: Subpart 1 of Part D of Title I (CAA §§ 171-179B; 42 U.S.C. §§ 7501-7509a) and Subpart 2 of Part D of Title I (CAA §§181-185B; 42 U.S.C. §§ 7511-7511f). Every party who has examined the question, however, agrees that implementation under Subpart 2 simply would be unworkable: Subpart 2 codifies design values, a classification scheme, and deadlines specifically tailored to the current, one-hour, 0.12 ppm ozone NAAQS, and this framework simply cannot be applied – from a plain language or practical standpoint – to the revised eight-hour, 0.08 ppm ozone NAAQS without producing absurd results. Only two

possible conclusions can be drawn: either the revised NAAQS. Only two possible conclusions can be drawn: either the revised NAAQS cannot be implemented at all *or* implementation of the revised NAAQS must occur under Subpart 1.

2. Industry Respondents maintain that the language, structure, and legislative history of the Act demonstrate that Congress intended Subpart 2 to constitute the comprehensive and exclusive framework for implementation of ozone NAAQS, and that EPA has no authority under Subpart 1 or Subpart 2 to implement a revised ozone NAAQS. We agree completely, but will not repeat those arguments here.

3. EPA not only asserts the authority to revise the NAAQS that Congress established in Subpart 2, and to implement its revised NAAQS under Subpart 1. The Agency claims, moreover, that it has the power under Subpart 1 to require an area to take all steps necessary to comply with its more stringent, revised NAAQS at the same time (or even before) the area was required by Congress to attain the less stringent NAAQS under Subpart 2. EPA's position cannot be reconciled with the language and structure of the statute or with its legislative history. If EPA has any power to enforce revised ozone NAAQS under Subpart 1, it could conceivably have that authority, consistent with the statute, only in areas that have already attained the existing one-hour 0.12 ppm NAAQS in accordance with Subpart 2.

4. EPA's assertion that it can implement a revised ozone NAAQS under Subpart 1 before an area has attained the NAAQS mandated by Congress in Subpart 2 is foreclosed by the plain language of the statute. Although Subpart 1 allows EPA generally to classify and set attainment dates for nonattainment areas, the statute expressly withholds such authority from EPA "with respect to nonattainment areas for which" classifications and attainment dates "are specifically provided under other

provisions of [Part D]." CAA § 172(a)(1)(C), (a)(2)(D), 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D). Classifications and attainment dates for "[e]ach area designated nonattainment for ozone" are "specifically provide[d]" under an "other provision" of Part D – Subpart 2. CAA §181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1. Accordingly, EPA has no authority under Subpart 1 to classify or to set attainment dates for areas that are not yet in attainment with the Subpart 2 NAAQS.

5. Simultaneous enforcement of the revised ozone NAAQS under Subpart 1 would also undermine the core purposes of Subpart 2. When Congress enacted Subpart 2 in 1990, it codified a considered and detailed plan to ensure progress towards, and eventual attainment of, the one-hour, 0.12 ppm ozone standard in all areas of the country. The requirements of Subpart 2 reflect a careful balance of environmental goals and economic realities, and a recognition that areas with more serious air quality problems need more time to reach attainment. Once enacted, the specifications of Subpart 2 stripped EPA and the States of much of the discretion they had enjoyed under Subpart 1 to determine when and how the ozone NAAQS would be attained.

6. EPA's interpretation of the statute would allow the Agency to circumvent and render meaningless Congress's comprehensive and reticulated legislative framework simply by revising the NAAQS. Under EPA's interpretation, for example, the Agency could have promulgated a more stringent revised NAAQS immediately after Subpart 2 was enacted and required areas to meet the original and revised NAAQS "simultaneously," such that areas which Congress had given 15, 17 or even 20 years to meet the 0.12 ppm NAAQS under Subpart 2 could have been forced, at the Agency's discretion, to meet in only five years the more stringent, revised NAAQS under Subpart 1. This Court should not lightly presume that Congress delegated to EPA

the discretion to make its comprehensive ozone attainment scheme utterly superfluous.

7. As the D.C. Circuit correctly held, the plain language and purpose of the 1990 amendments require implementation of any ozone NAAQS to occur "in conformity with Subpart 2." *American Trucking Ass'ns v.. Browner*, 195 F.3d 4, 10 (D.C. Cir. 1999) ("ATA II"). That necessarily means that, even if EPA has authority to implement a revised NAAQS under Subpart 1, an area must first adhere to the mandate of Subpart 2 – and only that mandate – until it has attained the preexisting NAAQS. EPA may not require an area simultaneously to undertake measures to attain a more stringent revised NAAQS.

ARGUMENT

I. EVERYONE AGREES THAT THE REVISED NAAQS CANNOT BE IMPLEMENTED UNDER SUBPART 2

The parties to this litigation have advanced various and conflicting interpretations of the interplay between Subpart 1 of Part D of Title I of the Clean Air Act, entitled "Nonattainment Areas in General" (*see* CAA §§ 171-179B, 42 U.S.C. §§ 7501-09a), and Subpart 2 of Part D of Title I, entitled "Additional Provisions for Ozone Nonattainment Areas" (*see* CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f). But no one – neither EPA nor industry (nor intervenors or *amici* in support of either EPA or industry) – has suggested that the revised ozone NAAQS can be implemented under Subpart 2. Everyone who has examined and taken a position on how Subpart 2 might apply to the revised ozone standard agrees that Subpart 2 implementation would be unworkable. The design values, classification scheme, and deadlines set forth in Section 181 of Subpart 2 establish a NAAQS implementation framework specifically tailored to the existing one-hour, 0.12 ppm NAAQS. This framework simply has no applicability to any revised ozone NAAQS. Indeed, any attempt by EPA to apply this framework to the

revised eight-hour, 0.08 ppm ozone NAAQS would produce nonsensical results.

To begin with, EPA's revised ozone standard cannot be used to classify areas under Subpart 2. Section 181(a)(1) requires that an area's design value (*i.e.*, the quantitative measurement of its air quality) – which determines the area's attainment/nonattainment status – "be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). In other words, Subpart 2 requires use of the *particular air quality measure* that was specifically developed for the ozone standard existing in 1990.[1] EPA's pre-1990 air quality measure for the 0.12 ppm NAAQS is based on a *one-hour averaging time* and an examination of the number of days the current standard is exceeded. 62 Fed. Reg. 38,856, 38,857 (1997), Ozone Joint Appendix in D.C. Cir. No. 97-1441 ("OJA") at 1, 2. In contrast, the revised 0.08 ppm standard is based on an *eight-hour averaging time* and a determination of whether certain readings exceed the revised standard.[2] Thus, compliance with the revised standard is based on an entirely different averaging period and statistical form than the existing standard. Because the form of the ozone standard

---

1 The statute provides that if EPA modifies the design value in severe nonattainment areas, "a design value or other indicator *comparable to 0.140 in terms of its relationship to the standard* shall be used in lieu of 0.140. . . ." *See* CAA § 181(b)(4)(D), 42 U.S.C. § 7511(b)(4)(D). This is the only context in which the statute gives EPA authority to modify the design value in Subpart 2. Even in this context, the statute requires that any revised methodology be "comparable" to the methodology prescribed by Section 7511(a)(1) (which is linked to the one-hour standard), precluding the adoption of a new methodology for the significantly different eight-hour standard.

2 Attainment is measured by whether the three-year average of the annual fourth-highest daily maximum eight-hour average concentration exceeds 0.08 ppm. 40 C.F.R. § 50.10(b) (1999).

is a crucial part of the standard itself,[3] it is not possible to classify areas for the eight-hour standard using the methodology developed for the one-hour standard.

Second, even if classification were somehow possible, if Subpart 2 governs implementation of the revised NAAQS, then every area that has attained the 0.12 ppm, one-hour standard by the time of its designation under any revised NAAQS would be forever exempt from complying with the revised standard. That is so because Subpart 2 requires that "[e]ach area designated [as] nonattainment for ozone . . . be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1, in turn, contains five different ranges of design values – with each range specifying a different nonattainment classification and attainment date – but the lowest design value addressed in Table 1 is 0.121 ppm, which falls just above the current 0.12 ppm ozone NAAQS. Thus, if Subpart 2 governs the implementation of revised ozone NAAQS, the revised eight-hour, 0.08 ppm standard promulgated by EPA would not apply to any areas that meet the current one-hour, 0.12 ppm standard – which comprise the vast majority of areas likely to be above the revised, eight-hour 0.08 ppm NAAQS.[4] *See American Petroleum Inst. v. United States EPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that areas in nonattainment with the current standard but with a design value of less than 0.12 are not covered by Table 1).

---

3 *See* 62 Fed. Reg. at 38,863 ("Taken together, the level and form of the standard, for a given averaging time, determine the degree of public health protection afforded by the standard. Consideration of the level of the standard . . . reflects a recognition of this linkage between level and form. . . .").

4 *See infra* at 17.

Third, if Subpart 2 governs implementation of revised ozone NAAQS, most areas that do not yet meet the current one-hour, 0.12 ppm standard – and that therefore would be required to meet the revised eight-hour, 0.08 ppm standard – (including, for example, Atlanta, Dallas, Phoenix, San Diego, St. Louis, Pittsburgh, Louisville and Washington D.C.) would be required to meet the more stringent, revised standard *immediately*. That is so because the timetables and deadlines under Subpart 2 began to run in 1990, and three of the five attainment deadlines already have passed. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1 (specifying 1993, 1996, and 1999, as well as 2005 and 2010, as attainment dates). For example, areas with current ozone levels in the range of 0.120 - 0.138 ppm ("marginal" nonattainment areas) would need to have met the revised 0.08 ppm standard in 1993, even though the revised standard was not promulgated until 1997. Moreover, having missed that 1993 attainment date, as well as the next two attainment dates (1996 and 1999), these areas would now be classified as "severe" and would *immediately* be subject to enhanced control measures, emission reduction milestones, and other requirements for severe nonattainment areas. *See generally* CAA § 182, 42 U.S.C. § 7511a.[5] Indeed, Subpart 2 would have the absurd result of rendering most of these nonattainment areas liable for punitive sanctions (including the loss of federal highway funds) even though these areas would have had no opportunity to work toward attainment. CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1); *see also* CAA § 185(b), 42 U.S.C. § 7511d(b) (penalty of $5000 per ton

---

5 EPA's authority to modify the attainment dates in Table 1 is strictly limited to areas redesignated to nonattainment after having been initially designated in attainment for the one-hour standard following enactment of the 1990 amendments (*i.e.*, under Section 107(d)(4)). CAA § 181(b)(1), 42 U.S.C. § 7511(b)(1). EPA has no authority to modify the attainment dates for areas designated nonattainment for the revised standard pursuant to section 107(d)(1)(B).

imposed on major sources in certain areas that fail to attain the current standard).

In sum, any attempt to implement a revised ozone standard under Subpart 2 would be legally, technically and practically unworkable. Some currently less polluted areas would not be required to comply with the revised standard even though they would be in clear violation of it. Meanwhile, other currently more polluted nonattainment areas would have no reasonable opportunity to work towards attainment before severe sanctions were imposed on them (contrary to Congress' clear desire in enacting Subpart 2 to provide more polluted areas with more, not less, time to come into compliance). *See, e.g.*, H.R. Rep. No. 101-490, pt. 1, at 234, *reprinted in* Senate Comm. on Env't & Pub. Works, 2 *A Legislative History of the Clean Air Act Amendments of 1990*, S. Print 103-38, at 3258 (1993) ("*Legislative History*"), OJA at 3603 ("Areas with more serious pollution problems are given more time to attain the standards, but required to put in place a more aggressive program of control measures."); House Debate on the Conference Report (Oct. 26, 1990), *reprinted in* 1 *Legislative History* at 1236 (statement of Rep. Fields, co-sponsor of H.R. 3030, 101st Cong. (1990)) ("House Debate"), OJA at 3543 ("We have placed what we hope are more realistic deadlines in the new law.").

Consequently, the parties correctly agree that the statute cannot reasonably be read to permit implementation of revised ozone NAAQS under Subpart 2. *See Griffin v. Oceanic Contractors. Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("avoid . . . unreasonable results whenever possible").

II. IF THE COURT DECIDES EPA HAS AUTHORITY TO IMPLEMENT REVISED OZONE NAAQS UNDER SUBPART 1, EPA COULD CONCEIVABLY HAVE THAT AUTHORITY ONLY IN THOSE AREAS THAT HAVE ATTAINED COMPLIANCE WITH THE CURRENT NAAQS UNDER SUBPART 2

Because revised ozone NAAQS cannot practicably be implemented under Subpart 2, there are only two alternatives: (i) either revised NAAQS cannot be implemented at all (which is the thrust of Industry Respondents' argument), *or* (ii) revised NAAQS must be implemented under Subpart 1 (as EPA contends). We agree completely with Industry Respondents' view, but will not repeat their arguments here. Instead, we assume for purposes of this brief that EPA could implement the revised NAAQS under Subpart 1, and we address solely how that might be accomplished.

Judge Tatel in his concurring opinion suggested that, once an area attains the existing one-hour, 0.12 ppm standard in accordance with Subpart 2, EPA *then* might implement the revised eight-hour, 0.08 ppm standard under Subpart 1. *ATA II*, 195 F.3d at 12. EPA argues that it has the authority to require areas to comply with the revised eight-hour NAAQS and the one-hour NAAQS simultaneously. In EPA's view, because "Subpart 1 and Subpart 2 require that all areas attain the NAAQS as 'expeditiously as practicable,'" the Agency "is justified in concluding that it should implement the revised ozone standard without delay throughout the Nation." Brief for the Petitioners ("Pet. Br.") at 49.[6]

---

6 *See also id.* ("It is entirely reasonable . . . for Congress to require that, once EPA determines that a revised NAAQS is necessary to protect public health, the revised NAAQS should be attained without avoidable delay *notwithstanding* the timetable that Congress envisioned for the standard then in effect.") (emphasis added).

EPA's interpretation would as a practical matter allow the Agency to override Subpart 2 entirely whenever EPA decides that the NAAQS should be revised. That interpretation cannot be squared with the statute's plain language or its legislative history.

A. Congress Enacted Subpart 2 As A Detailed And Comprehensive Framework For Implementation Of The Ozone NAAQS

Congress recognized in 1990 that attainment of the one-hour, 0.12 ppm ozone NAAQS in many areas of the country posed particular and seemingly intractable problems. Although the Act required all areas of the country to attain the NAAQS "as expeditiously as practicable but no later than December 31, 1987," 42 U.S.C. § 7502 (1988), many areas still had not attained the ozone standard by 1990. *See* H.R. Rep. No. 101-490, pt. 1, at 145-50, *reprinted in* 2 *Legislative History* at 3170-71 ("In 1977, Congress tried to waive [sic] a 'magic wand' and command that all nonattainment areas [for ozone] will meet the applicable [NAAQS] by December 31, 1982. . . . [That] date[] ha[s] come and gone and it is clear that . . . we had no 'magic' solutions"). Indeed, in 1990, 186 areas were in nonattainment,[7] and many of those areas did not even have plans for how the standard could ever be attained.

Congress addressed this situation by substantially revising the Clean Air Act to add, among other provisions, specific implementation requirements for ozone. These provisions are codified as Subpart 2 of Part D of Title I of the Clean Air Act, 42 U.S.C. §§ 7511-7511f. The Act specifically provides, moreover, that the Subpart 2 program overrides Subpart 1 in certain key respects (*e.g.*, area

7 *See* 40 C.F.R. § 81.300-.356 (1990). Areas could be as small as a single county (*e.g.*, Campbell County, Kentucky) or as large as an entire State (*e.g.*, Massachusetts).

designations and classifications for the one-hour standard).[8] *See* CAA § 172(a)(1)(C), (a)(2)(D), 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D); CAA § 181(a), (b), 42 U.S.C. § 7511(a), (b).

Recognizing that air quality in some areas was worse than in others, and that some areas would unquestionably need more time than others to attain the existing ozone NAAQS, Congress allowed the various nonattainment areas between 3 and 20 years to come into attainment, depending upon the severity of the area's ozone problem. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1. At the same time, Congress required areas with more severe nonattainment problems to impose more stringent mandated measures to reduce emissions. Congress also established "reasonable further progress," or milestone, requirements to ensure that States made steady progress towards meeting the NAAQS. CAA § 182(b)(1), 42 U.S.C. § 7511a(b)(1); *see also* CAA § 182(a), (b), (c), (d) and (e), 42 U.S.C. § 7511(a), (b), (c), (d) and (e). As discussed in the debate over the 1990 amendments, these "milestone provisions of the bill [we]re designed to avoid a repeat of the situation that occurred when [Congress] passed the 1977 amendments," which allowed States to go for years without having to demonstrate progress. *See* Senate Debate (Jan. 23, 1990), 4 *Legislative History* at 4837 (statement of Senator Chafee, co-sponsor of S. 1630, 101st Cong. (1990)).

Congress required areas classified as "serious," "severe" or "extreme" nonattainment to include "contingency plans" with specific measures that must be implemented if the area fails to meet these milestones. *See* CAA § 182(c)(9), (d) and (e), 42 U.S.C. § 7511a(c)(9), (d) and (e). Moreover, if an area misses its attainment deadline, Subpart 2 provides that the

8 *See, e.g.*, H.R. Rep. No. 101-490, pt. 3, at 3, *reprinted in* 2 *Legislative History* at 3721 ("The Clean Air Act Amendments of 1990 provide a *comprehensive* legislative framework for obtaining [*sic* – attaining] and maintaining the national ambient air quality standards.") (emphasis added).

area "bumps up" to the next classification, with a new attainment deadline but more stringent control measures. CAA §181(b)(2), 42 U.S.C. § 7511(b)(2). In summary, under Subpart 2, "[a]reas with more serious pollution problems are given more time to attain the standards, but required to put in place a more aggressive program of control measures." H.R. Rep. No. 101-490, pt. 1, at 234, *reprinted in* 2 *Legislative History* at 3258, OJA at 3603.

Subpart 2 represented a fundamental departure from the historic approach to implementing the NAAQS. Previously, the Act merely set a single overall attainment date, allowing States wide latitude in determining what controls should be imposed. CAA § 172, 42 U.S.C. § 7502 (1988). In enacting Subpart 2, Congress established a graduated series of attainment deadlines (rather than allowing EPA to set the deadlines) and at the same time stripped States of much of their discretion to determine appropriate control measures. Congress did so because the old model simply had not succeeded in resolving the ozone problem. *See* House Debate, *reprinted in* 1 *Legislative History* at 1236, OJA at 3543 (statement of Rep. Fields) ("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment are[a]s which will in turn have to impose such requirements on industry in those areas."); *see also* Senate Debate (Mar. 21, 1990), *reprinted in* 4 *Legislative History* at 6056 (statement of Sen. Baucus, co-sponsor of S. 1630, 101st Cong. (1990)) (Subpart 2 includes "a lot of requirements on [non]attainment areas to get the job done. . . . [Subpart 2] is tailored as well as it could be to help encourage those [non]attainment areas to get the job done.").

In enacting Subpart 2, Congress also consciously balanced economic and environmental considerations. *See* H.R. Rep. No. 101-490, pt. 1, at 235, *reprinted in* 2 *Legislative History* at 3259, OJA at 3604 (noting the Committee's goal of "reconcil[ing] economic growth with clean air"); *id.* at 3258, OJA at 3603 ("This program is intended to allow economic growth and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced."); House Debate, *reprinted in* 1 *Legislative History* at 1414 (statement of Rep. Oxley) ("[T]hroughout the development of this legislation, we have worked to ensure that environmental progress does not jeopardize economic growth."); House Debate (May 21, 1990), *reprinted in* 2 *Legislative History* at 2655 (statement of Rep. Shuster) ("So while we must support clean air, we must likewise be equally concerned that there be a balance, a balance that recognizes not only the importance of clean air, but the importance of providing jobs for our people and creating a continuing growing economy."). Thus, Congress crafted a compromise program that forced progress, but also set achievable goals within a reasonable timeline that took into account economic concerns.

B. Simultaneous Implementation Of The Current And Revised Ozone NAAQS Would Conflict With The Plain Language Of The Statute And Would Nullify Subpart 2's Comprehensive And Reticulated Enforcement Scheme

1. Subpart 1 – By Its Clear Terms – Does Not Apply To Areas Governed By The Attainment Dates Specified In Subpart 2.

Under EPA's interpretation, Congress gave the Agency discretion to nullify Subpart 2's comprehensive and reticulated enforcement scheme at any time simply by revising the ozone NAAQS. That interpretation cannot be – and is not – correct. As this Court has cautioned, "'[i]n our anxiety to effectuate the Congressional purpose of

protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (citation omitted) (*cited in FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000)).

Contrary to EPA's view, at a minimum, Subpart 2 must be allowed to run its course *before* any revised ozone standard can be implemented under Subpart 1. In other words, areas must be allowed to comply with the mandate of Subpart 2 until they have attained the one-hour, 0.12 ppm NAAQS. Only once they have done so could EPA conceivably have the authority to require measures to attain the more stringent eight-hour, 0.08 ppm NAAQS in accordance with the provisions of Subpart 1. The plain language of the statute forbids EPA's simultaneous-implementation approach.

While Subpart 1 (Section 172(a)(1)(A)) allows EPA generally to "classify" areas as attainment or nonattainment, the statute makes it clear that such authorization does "not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of [Part D of Title I]." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C). Similarly, while Section 172(a)(2) provides that the NAAQS attainment date for an area under Subpart 1 shall be "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment," CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A), the statute makes clear that EPA has no authority to set an attainment date "with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of [Part D of Title I]." CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D). Section 181(a)(1), Table 1 – within Subpart 2 of Part D – "specifically provides" classifications and attainment dates for areas that are not in attainment with the existing one-

hour, 0.12 ppm ozone standard. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1), Table 1.

Of the approximately 3,000 "areas" in the United States, 33 currently are in *non*attainment with the one-hour ozone standard. *See* 40 C.F.R. Part 81. These 33 areas plainly are "nonattainment areas for which [classifications and] attainment dates are specifically provided" under an "other provision" of Part D – Subpart 2. Thus, under the plain language of the statute, EPA has no authority under Subpart 1 either to classify or to set attainment dates concerning a revised NAAQS for these areas. Any implementation authority that EPA might have under Subpart 1 could only be exercised once each of these 33 areas attains the one-hour NAAQS, thus ceasing to be a "nonattainment area" for which classifications and attainment dates are specifically provided under other provisions of Part D. As Judge Tatel explained in his concurrence, only this approach allows EPA to implement the revised ozone NAAQS under Subpart 1 "*without conflicting with Subpart 2's classifications and attainment dates.*" *ATA II*, 195 F.3d at 11 (emphasis added).[9]

---

9 EPA insists that Judge Tatel's reading is not correct because Section 181(a) (in Subpart 2) establishes the *maximum* amount of time allowable for attainment. Pet. Br. at 48. EPA's argument is an utter non sequitor. Whether the dates in Section 181(a) are outside limits does not change the fact that, for those areas within its purview, Section 181(a) is a provision of Part D distinct from Subpart 1 which "specifically provides" attainment dates, thereby ousting – pursuant to the plain language of the Act – EPA's authority to set other attainment dates for such areas under Subpart 1. *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Where "Congress has directly spoken to the precise question at issue . . . the court . . . must give effect to the unambiguously expressed intent of Congress."); *Brown & Williamson Tobacco*, 120 S. Ct. at 1300 (same). Moreover, because Table 1 of Section 181(a) *allows* areas to take the maximum time to reach attainment, it provides no support for EPA's claim that the Agency can require these same areas to do more, and more quickly, pursuant to Subpart 1. *See, e.g.*, H.R. Rep. No. 101-490, pt. 1, at 229, *reprinted in* 2 *Legislative History* at 3253, OJA at 3598 (the deadlines in Table 1 are

Not only does the statutory language make it abundantly clear that Congress intended Subpart 2 to have primacy over ozone NAAQS attainment, but as detailed below, EPA's contrary interpretation also would permit the Agency to render Subpart 2 a nullity whenever it decides to revise the ozone NAAQS. It is inconceivable that Congress could have delegated that wholesale authority to EPA without ever saying so. *See, e.g., Brown & Williamson Tobacco*, 120 S. Ct. at 1315 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general savings clause.").

2. Simultaneous Implementation Of The Current And Revised NAAQS Would So Undermine the Purposes of Subpart 2 As To Render Subpart 2 A Nullity

Under EPA's reading of the Act, the Agency in 1991 could have revised the ozone NAAQS slightly to be, say, 0.119 ppm, using the very same one-hour averaging scheme as under the prior standard. Although virtually identical to the one-hour, 0.12 ppm NAAQS for which Congress created Subpart 2, according to EPA's logic, the Agency could have implemented this revised 0.119 ppm NAAQS under Subpart 1 *simultaneously* with implementation of the 0.12 ppm standard under Subpart 2. Indeed, under EPA's reading of the statute, the Agency could have set a dramatically more stringent NAAQS in 1991 – 0.04 ppm, for example – and demanded compliance with that substantially more stringent standard in only five years.[10]

"intended to provide a reasonable target for a large class of nonattainment areas").

10 *See* CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A). In contrast, Congress expressly granted Los Angeles twenty years to meet the 0.12 ppm NAAQS under Subpart 2, giving Chicago, New York City and Houston 17 years and Baltimore, Philadelphia and Sacramento 15 years. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1).

These examples demonstrate dramatically that, under EPA's view of the statute, the Act gives EPA the discretion to use Subpart 1 to supersede Subpart 2 whenever EPA revises the NAAQS. That is surely not what Congress intended. As the D.C. Circuit noted, EPA's explanation "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2; under EPA's interpretation, that scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, 1050 (D.C. Cir. 1999) ("*ATA I*").

There is no need, however, to resort to hypotheticals: Simultaneous enforcement of the eight-hour, 0.08 ppm ozone NAAQS that EPA actually adopted also would frustrate the intent of Subpart 2 because it would require several of this country's largest metropolitan areas to comply with the Agency's more stringent, revised NAAQS within the same period – or even faster than – Congress established in Subpart 2 for attainment of the existing standard.

Under Section 107(d) of the Act, EPA was required to designate all areas as attainment or nonattainment within two years after revising the NAAQS in 1997. CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i). Congress in subsequent legislation, however, delayed this deadline by a year, to 2000 (although it expressly took no position on the validity of the revised ozone NAAQS itself). Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §§ 6102(d), 6103(a), (b), 112 Stat. 107, 464-65 (1998). Subpart 1 requires attainment with the NAAQS "as expeditiously as practicable, but no later than 5 years" from the date an area was designated nonattainment. CAA § 172(a)(2)(A), 42 U.S.C. § 7502(a)(2)(A). While EPA may provide up to a five

year extension of the attainment deadline, Congress intended such extensions to be used sparingly. *See* S. Rep. No. 101-228, at 25 (1990), *reprinted in* 5 *Legislative History* at 8365 ("Except in unusual circumstances of severe levels of pollution and pollution sources that are exceptionally difficult to control, areas designated nonattainment should be required to achieve the health standards in, at most, five years from the date they are designated nonattainment. If the Administrator determines that attainment in five years is not feasible because of unusual circumstances, the extension should be for the *minimal* time needed, not automatically for an additional five years") (emphasis added).

As a result, the attainment deadline for all areas under the revised eight-hour ozone NAAQS is no later than 2005 (unless EPA grants the full five year extension to 2010).[11] Moreover, because EPA currently requires that an area have three years of clean data before it is deemed to meet the standard, an area effectively must have air that is clean enough to meet the revised standard by 2002 (or 2007 with the maximum extension). Memorandum from EPA Office of Air Quality Planning & Standards, *Proposed Implementation Guidance for the Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS) and the Regional Haze Program* 1, 83 (Nov. 17, 1998). Under the comprehensive ozone attainment scheme established pursuant to Subpart 2, however, Los Angeles has until 2010 to attain the one-hour standard, and

---

11 Upon application by the State, EPA may grant two additional "Extension Years," but only if an area has had "no more than a minimal number of exceedances" of the NAAQS "in the year preceding the Extension Year." CAA § 172(a)(2)(C)(ii), 42 U.S.C. § 7502(a)(2)(C)(ii). Accordingly, an area cannot receive an "extension" until the year by which it is required to meet the NAAQS, and then only if the area is very close to attainment. Because they cannot be granted in advance, these "Extension Years" cannot be counted when determining attainment deadlines.

several other major metropolitan areas – Chicago, Houston, and New York City, among others – have until 2007 to reach attainment.[12] Thus, under EPA's simultaneous-implementation scheme, these areas could be required to meet the more stringent 0.08 ppm eight-hour ozone standard under Subpart 1 somewhat before being required to attain the less stringent one-hour standard under Subpart 2. Congress plainly never intended that result.

Indeed, even if EPA granted all of these areas the ten-year maximum to meet the revised standard, these areas still would be required to continue to implement current control measures to attain the 0.12 ppm one-hour standard while simultaneously implementing more substantial measures to attain the more stringent 0.08 ppm eight-hour standard. Otherwise, an area could not feasibly achieve the first year of "clean air" under the revised eight-hour standard at the same time it meets the 2007 Subpart 2 attainment deadline.[13]

---

12 Los Angeles is the only area with a 2010 attainment deadline. The following areas have 2007 attainment deadlines: Chicago-Gary-Lake County, IL-IN; Houston-Galveston-Brazoria, TX; Milwaukee-Racine, WI; New York-N. New Jersey-Long Island, NJ-NJ-CT; Southeast Desert Modified AQMA, CA. *See* 40 C.F.R. Part 81.

13 EPA claims that it is not unusual for areas to be subject to more than one NAAQS at a given time, Pet. Br. at 49, n.31 (citing 40 C.F.R. §§ 50.4(a)-(b), 50.8(a)(1)-(2)), but neither of the references cited by EPA involve two standards for the same pollutant that are intended to address the same health effects and are implemented simultaneously under separate statutory schemes.

Specifically, 40 C.F.R. § 50.4(a) and (b) sets two primary standards for sulfur oxides (SO_x): A twenty-four-hour standard (0.14 ppm) and an annual (0.03 ppm) standard. The preamble in the rule establishing these standards clearly states that the one-hour SO_x standard was specifically meant to protect against spikes, whereas the annual SO_x standard is meant to guard against chronic problems. 61 Fed. Reg. 25,566, 25,579 (1996).

EPA's other reference, 40 C.F.R. § 50.8(a)(1) and (2), establishes two primary standards for carbon monoxide (CO): A one-hour (35 ppm) standard and an eight-hour (9 ppm) standard. Only the eight-hour CO

For these areas – as well as areas such as Baltimore, Philadelphia and Sacramento, which have 2005 attainment deadlines under Subpart 2 – EPA's simultaneous-implementation approach will, at a minimum, impose tremendous additional costs that Congress never contemplated or approved when it enacted Subpart 2. Los Angeles alone, for example, currently spends $1.7 billion per year to reach attainment with the one-hour NAAQS.[14] According to EPA, "full attainment costs of the selected [revised] standard are estimated at $9.6 billion per year *incremental* to the current standard." EPA Office of Air Quality Planning and Standards, *Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards & Proposed Regional Haze Rule* ES-13, 9-1 (July 16, 1997) ("EPA RIA") (emphasis added). EPA acknowledges its cost estimates are incomplete, however, because new technologies will need to

standard is used in determining attainment status, however. *See* CAA § 186(a), 42 U.S.C. § 7512(a). Thus, the two primary standards for CO and SO_x are factually distinguishable from the one-hour and eight-hour ozone standards. More importantly, neither the primary standards for CO nor those for SC_x have dual implementation schemes.

14 South Coast Air Quality Management District, *Socioeconomic Report for the 1997 Air Quality Management Plan* ES-2 (last modified Jan. 10, 1997) <http://www.aqmd.gov/aqmp/97aqmp>. This cost is estimated to result in an annual 2,264 jobs forgone in Los Angeles. *Id.* While other areas tend not to publish the estimated costs of ozone attainment, the cost of implementing extensive emissions reduction programs clearly is substantial. *See, e.g.*, New York State Dep't of Envtl. Conservation Air Resources, Draft Ozone Attainment Demonstration for the New York City Metropolitan Area Including Portions of Connecticut & Northern New Jersey (last modified July 1998) <http://www.dec.state.ny.us/website/dar/reports/comment.html> (proposed Standard Implementation Plan ("SIP") for the one-hour NAAQS for New York City-Northern New Jersey-Long Island); Texas Natural Resources Conservation Commission, Houston-Galveston Clear Air Rules and Plans (last modified Aug. 23, 2000) <http://www.tnrcc.state.tx.us/oprd/hgasip.html> (proposed SIP for the Houston-Galveston area).

be developed to allow some areas to reach attainment with the eight-hour standard. *See id.*[15]

EPA's approach – of requiring areas such as Baltimore, Chicago, Houston, Los Angeles, New York City, Philadelphia, and Sacramento to do more, and more quickly, than was provided under Subpart 2 – frustrates the purposes of Subpart 2. Indeed, Congress set forth specific emission reduction milestones in Subpart 2: in order to show "reasonable further progress" toward attainment, areas currently classified as moderate or above must achieve emission reductions of 15 percent over the period from November 1990 to November 1996. CAA § 182(b)(1)(A), 42 U.S.C. § 7511a(b)(1)(A). In addition, areas currently classified as serious or above must achieve at least a 9 percent reduction in emissions over each 3 year period from 1996 until attainment. CAA § 182(c)(2)(B), 42 U.S.C. § 7511a(c)(2)(B). In other words, Congress in Subpart 2 mandated slow but steady progress towards meeting the NAAQS.

While Subpart 1 includes no specific reduction mandates, as a practical matter States would be required to impose

15 Indeed, EPA has acknowledged that some areas will not be capable of attaining the revised standard by 2010. *See* EPA RIA at ES-4, 4-69; *see also id.* at 9-3 ("[T]hese areas [with the most difficult air quality challenges will] achieve approximately *one third of the reductions needed* to attain the new standards in 2010.") (emphasis added). According to EPA, these areas will have to rely on control technologies that have not even been developed in order to meet the revised standard. *See id.* at 9-2 ("However, for some of the areas with the most difficult air quality challenges, substantial technological advance is needed."). The RIA stresses that "EPA wishes to pursue an approach analogous to that established by Congress in [Subpart 2,] section 182(e)(5)," which allows States to rely on new and developing technologies that are not currently available for purposes of demonstrating that their most serious nonattainment areas will attain the NAAQS. *Id.* at 9-14. In other words, EPA intends to incorporate a provision in Subpart 2 into its attainment program under Subpart 1 to make it easier for areas struggling with the current standard to show they can achieve attainment with the revised standard.

more stringent emission reduction targets to meet the deadlines for attaining the revised NAAQS. *See, e.g.*, CAA § 179(d)(2), 42 U.S.C. § 7509(d)(2) (if an area fails to attain the relevant standard, EPA may reasonably prescribe *any* measure that can be feasibly implemented in the area). Simultaneous implementation of more stringent emission reduction milestones under Subpart 1 would undermine Congress' careful balancing in Subpart 2 of environmental and economic concerns.

Congress cannot have intended to permit EPA so easily to subvert the carefully wrought attainment scheme for the existing NAAQS that Congress created in Subpart 2. When faced with similarly "'comprehensive and reticulated'" statutes, this Court has noted its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (citation omitted); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) (In evaluating "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests . . . , [w]e will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.").[16] Similarly here, adopting EPA's reading of the statute would tamper with the comprehensive implementation scheme enacted in Subpart 2, thereby changing the balance struck by Congress between environmental protection and economic realities.[17]

---

16 As the D.C. Circuit found, "[t]hat Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2." *ATA I*, 175 F.3d at 1049. The "wide discretion [that EPA claims under Subpart 1] is inconsistent . . . with Subpart 2, in which the Congress stripped the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment." *Id.*

17 The D.C. Circuit held that, because Subpart 2 applies only to the primary ozone NAAQS, it does not preclude EPA from requiring attainment of the secondary ozone NAAQS "as expeditiously as practicable." *ATA II*, 195 F.3d at 10. That holding cannot be correct. The statute clearly establishes that areas are to focus first on attainment of the primary standards: both Subpart 1 and Subpart 2 provide that primary standards are to be attained "as expeditiously as practicable, but no later than" a date certain. CAA § 172 (a)(2)(A), 42 U.S.C. § 7502(a)(2)(A); CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). While secondary standards also must be attained "as expeditiously as practicable," the statute establishes no firm attainment deadline for such standards, *see* CAA § 172(a)(2)(B), 42 U.S.C. § 7502(a)(2)(B), demonstrating both that Congress considered secondary standards (which protect "public welfare" as opposed to "public health") to be a lower priority and that Congress expected attainment of secondary standards generally to occur *after* attainment of primary standards. Congress clearly did not intend to allow EPA to circumvent the comprehensive and reticulated attainment program it established under Subpart 2 for the primary standard by implementing a more stringent *secondary* standard under Subpart 1. Indeed, Congress's express determination that areas must be allowed to take the full amount of time specified in Table 1 of Subpart 2 to reach attainment should flatly foreclose EPA from requiring areas to comply more quickly with a more stringent primary *or* secondary NAAQS.

CONCLUSION

The statutory language and legislative history make abundantly clear that Congress intended Subpart 2 to serve as the comprehensive and exclusive framework for implementation of the ozone NAAQS. If the Court finds that EPA can implement revised NAAQS under Subpart 1, however, EPA could conceivably do so, consistent with the text, structure, and history of the Act, only in areas that have already attained the one hour ozone NAAQS pursuant to Subpart 2. *Amici* take no position on Questions 1 and 2 presented by EPA in its brief.

Respectfully submitted,

GREGORY S. SLATER
INTEL CORPORATION
5000 West Chandler Boulevard
Mail Stop CH-6 404
Chandler, AZ 85226-3699
(480) 554-4032

RICHARD P. BRESS
(COUNSEL OF RECORD)
JULIA A. HATCHER
CLAUDIA M. O'BRIEN
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004
(202) 638-3690
*Counsel of Record for the *Amici Curiae*

(27)

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

IN THE
Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE GENERAL ELECTRIC COMPANY IN SUPPORT OF RESPONDENTS

BENJAMIN W. HEINEMAN, JR.
BRACKETT B. DENNISTON III
STEPHEN D. RAMSEY
MATTHEW O. TANZER
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06431
(203) 373-2453

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
THOMAS C. GOLDSTEIN
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Counsel for Amicus Curiae

September 11, 2000

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effect an unconstitutional delegation of legislative power.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 1

ARGUMENT 4

I. THE NONDELEGATION DOCTRINE VINDICATES IMPORTANT PRINCIPLES OF GOVERNMENT ACCOUNTABILITY 5

II. THE NEED FOR THE NONDELEGATION DOCTRINE IS MORE ACUTE THAN EVER 10

III. SECTIONS 108 AND 109, AS INTERPRETED BY EPA, ARE INVALID UNDER THE NONDELEGATION DOCTRINE 18

IV. EPA'S DEFENSES OF ITS STATUTORY CONSTRUCTION ARE FLAWED 23

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page:**

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 7, 10
Alden v. Maine, 119 S. Ct. 2240 (1999) 5
American Petroleum Inst. v. EPA, 216 F.3d 50 (D.C. Cir. 2000) 11
American Petroleum Inst. v. EPA, 198 F.3d 275 (D.C. Cir. 1999) 12
American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 9
Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) 12
Association of Battery Recylers, Inc. v. EPA, 208 F.3d 1047 (D.C. Cir. 2000) 11
AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999) 9
Bowsher v. Synar, 478 U.S. 714 (1986) 9
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 7
Chemical Mfrs. Ass'n v. EPA, 217 F.3d 861 (D.C. Cir. 2000) 11
Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 3, 17
Chicago v. Morales, 527 U.S. 41 (1999) 9
Chlorine Chem. Council v. EPA, 206 F.3d 1286 (D.C. Cir. 2000) 12
City of Boerne v. Flores, 521 U.S. 507 (1997) 5
Clinton v. City of New York, 524 U.S. 417 (1998) 9, 11
Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914 (D.C. Cir. 1998) 12
Field v. Clark, 143 U.S. 649 (1892) 6
Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999) 5
Greene v. McElroy, 360 U.S. 474 (1959) 7

Cases (continued): **Page:**

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 8
Industrial Union Department, AFL–CIO v. American Petroleum Institute, 448 U.S. 607 (1980) 8-9, 13, 22
INS v. Chadha, 462 U.S. 919 (1983) 9, 12
International Union UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) 22-23
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 17
Jones v. United States, 120 S. Ct. 1904 (2000) 4
Kent v. Dulles, 357 U.S. 116 (1958) 8
Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 5
Kolender v. Lawson, 461 U.S. 352 (1983) 10
Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 18
Lignite Energy Council v. EPA, No. 98-1525, 1999 U.S. App. LEXIS 26263 (D.C. Cir. Sept. 21, 1999) 12
Loving v. United States, 517 U.S. 748 (1996) 3, 6, 26, 28
Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 18
McGautha v. California, 402 U.S. 183 (1971) 11
Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 9
Mistretta v. United States, 488 U.S. 361 (1988) 3, 6, 7, 16, 26
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 24
National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 7
New York v United States, 505 U.S. 144 (1992) 5
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 6, 10, 21-22, 30
Printz v United States, 521 U.S. 898 (1997) 5

Cases (continued): **Page:**

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 5
United States v. Lopez, 514 U.S. 549 (1995) 4, 29
United States v. Morrison, 120 S. Ct. 1740 (2000) 4
United States v. Robel, 389 U.S. 258 (1967) 11
United States v. Touby, 500 U.S. 160 (1991) 3, 26, 27
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 2, 6, 20

Statutory and Administrative Materials: **Page:**

Clean Air Act, 42 U.S.C. § 7401, et seq.
Section 108, 42 U.S.C. § 7408 ..... passim
Section 109, 42 U.S.C. § 7409 ..... passim
Section 202, 42 U.S.C. § 7521 16
Providing Reorganization Authority to the President, Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before the Legislation and Nat'l Security Subcomm. of the House Comm. on Government Operations, 95th Cong. (1977) 13
122 Cong. Rec. H10,685 (Sept. 21, 1976) 11
122 Cong. Rec. H10,673 (Sept. 21, 1976) 11
61 Fed. Reg. (1996)
65,651 20
65,727 26
65,728 25
62 Fed. Reg. (1997)
p. 38,863 20
p. 38,868 25
p. 38,883 24
EPA, Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper (July 1996) 24

Statutory and Administrative Materials (cont'd): **Page:**

EPA, Innovative Strategies and Economics Group Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule (1997) ... 23
EPA, Office of Air and Radiation, The Benefits and Costs of the Clean Air Act: 1970 to 1990 (1997) 23

Miscellaneous: **Page:**

Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) 14
Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000) 14
Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984) 13
Kenneth Culp Davis, ADMINISTRATIVE LAW OF THE EIGHTIES (1989) 13
John Hart Ely, DEMOCRACY AND DISTRUST (1980) 13
THE FEDERALIST No. 47 (Clinton Rossiter ed., 1961) 10
Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345 (1987) 14
Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989 (1999) 14
Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46 (1976) 14
Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999) 14
John Locke, TWO TREATISES OF GOVERNMENT (2d Treatise, New American Library 1965) 10

Miscellaneous (continued): **Page:**

Theodore J. Lowi, THE END OF LIBERALISM (1969) 15
Theodore J. Lowi, THE END OF LIBERALISM, THE SECOND REPUBLIC OF THE UNITED STATES (1979) 15
Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295 (1987) 15
John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) 12
Judge Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977) 15
William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 CARDOZO L. REV. 939 (1999) 15
David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) 16
David Schoenbrod, *Symposium – The Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives: Delegation and Democracy*, 20 CARDOZO L. REV. 731 (1999) 16
Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 NW. U. L. REV. 443 (1978) 15
Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 15
Nadine Strossen, *Delegation as a Threat to Liberty*, 20 CARDOZO L. REV. 361 (1999) 15
J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972) 13

INTEREST OF *AMICUS CURIAE*

The General Electric Company ("GE") is a diversified manufacturing and financial services company headquartered in Fairfield, Connecticut.[1] GE has numerous business units that provide a broad spectrum of goods and services throughout the United States and the world, including aircraft engines, appliances, capital services, industrial systems, lighting, medical systems, the NBC television network, plastics, power systems, and transportation systems.

GE's wide-ranging business activities are subject not only to the Clean Air Act, but all manner of administrative regulation. Accordingly, GE has an interest in the continuing vitality and proper implementation of the nondelegation doctrine of Article I of the Constitution and the separation of powers. The nondelegation doctrine ensures that important policy choices are made by the democratically accountable legislature, not by unelected agency officials. Because of the diversity of GE's business activities, it has broad experience from which to offer helpful guidance to this Court on the need for vigorous enforcement of the nondelegation doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals correctly held that EPA's interpretation of Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409, would violate the nondelegation doctrine. These provisions, as construed by EPA, do not merely authorize the agency to carry out or implement the statutory directives enacted by Congress, but effectively deputize EPA to engage in *lawmaking*. In administering Sections 108 and 109, EPA is

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or its counsel, has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of this Court.

going further than applying statutory factors prescribed by Congress or, in Chief Justice Marshall's words, "fill[ing] up the details" under the general provisions made by Congress. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

EPA itself takes the view that "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" before revising a National Ambient Air Quality Standard (NAAQS). Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 43 (D.C. Cir. filed Sept. 14, 1998). The Administrator need not even make a finding that her regulatory action is needed to protect against a "significant risk of harm." *Id.* "Nor is EPA required to follow any particular paradigm of decisionmaking." *Id.* at 29. Instead, according to EPA, Section 109 gives the Administrator broad authority to revise a NAAQS to any level that in her sole judgment reflects a "sufficient" level of risk reduction. *Id.* at 10, 29. "[T]he final choice of a standard is a quintessential policy judgment within the discretion of EPA," even though "[s]uch decisions present complex questions of science, law, and social policy." *Id.* at 28, 29 (internal quotations omitted). Hence, in issuing the rules under review, "EPA made policy judgments . . . concerning the point at which risks would be reduced sufficiently to protect public health with an adequate margin of safety." *Id.* at 10.

Hence, this case illustrates the very dangers addressed by the nondelegation doctrine – the risks that Congress will abdicate responsibility over critical policy judgments and that politically unaccountable agencies will seize the power to pursue their own policy agendas, asserting their own "discretion" as a shield to prevent meaningful judicial review.

The Government insists that Sections 108 and 109 satisfy the nondelegation doctrine because "EPA considers, among other public factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk." Govt. Br. in No. 99-1257, at 5. But these factors have been

selected by EPA. They were not adopted by Congress, and they are not set forth in the statute. This Court should make clear that an agency's self-imposed restraints cannot satisfy the requirements of the nondelegation doctrine that *Congress* codify adequate limits on agency action. The remand to the EPA ordered by the Court of Appeals in this case must therefore involve a search for congressionally enacted guidelines and boundaries, not simply an exercise of the agency's own discretion to formulate voluntary – and potentially temporary – limits to its rulemakings.

Further, the factors articulated by EPA fail to provide sufficient guidance to confine the agency and do not allow for meaningful judicial review of its decisions. The lack of clear congressional standards limiting EPA, coupled with the agency's unfettered discretion to establish its own guideposts, ensures that there is no adequate check on EPA's decisionmaking. The balance of authority contemplated by the separation of powers does not exist.

The Government suggests that the delegation here is no more expansive than those upheld by this Court in such cases as *Mistretta v. United States*, 488 U.S. 361 (1988), *United States v. Touby*, 500 U.S. 160 (1991), and *Loving v. United States*, 517 U.S. 748 (1996). That suggestion is false. In this case, Congress provided EPA with substantially *less* in the way of limiting standards and criteria for administrative decisionmaking than in any of the other cases cited by the Government. The delegation in this case is far beyond any upheld by this Court under the modern nondelegation doctrine.

The need for a vigorous nondelegation doctrine has only been heightened by the power accorded to administrative agencies since *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* announced a rule of deference to reasonable agency interpretations of ambiguous statutory provisions. Judicial deference to agency constructions of "ambiguous" statutory language presents risks to the constitutionally mandated separation of powers and principles of

legislative accountability. Without a vigorous nondelegation doctrine, agencies will be able to "find" ambiguities in ordinary language in order to arrogate to themselves the power essentially to make law – even though the unfettered ability to define as the law of the land any rationally supportable version of what a statute's words *might* mean is the very essence of the legislative authority granted to Congress by Article I.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized limits on Congress' power under the Commerce Clause in no small part because of a realization that the Government's constitutional theory knew no bounds. *See* 514 U.S. at 564. The same considerations are applicable here: if EPA's interpretation of Sections 108 and 109 were upheld, then virtually any congressional delegation of authority to an administrative agency would become permissible. Accordingly, this case presents an important opportunity not only to affirm the Court of Appeals' judgment invalidating EPA's unlawfully expansive interpretation of Sections 108 and 109 of the Clean Air Act, but also to establish a broader precedent affirming the continuing vitality of the nondelegation doctrine.

The judgment of the Court of Appeals invalidating EPA's interpretation of Sections 108 and 109 accordingly should be affirmed.

ARGUMENT

This case presents an important opportunity to reaffirm the limits on governmental power reflected in the nondelegation doctrine, just as a series of recent cases has enabled this Court to revitalize other notable restraints upon congressional and executive power. For example, this Court has affirmed the limits of the Article I commerce power. *See Jones v. United States*, 120 S. Ct. 1904 (2000) (construing federal arson statute narrowly); *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down civil suit provision in Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free

School Zones Act).

Similarly, this Court has held that Congress, acting under its Article I legislative powers, may not abrogate state Eleventh Amendment immunity by subjecting states to suit in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Congress may not commandeer state legislative processes or require state executive officials to enforce federal law. *New York v United States*, 505 U.S. 144 (1992) (nuclear waste statute); *Printz v United States*, 521 U.S. 898 (1997) (Brady law). Nor may Congress force a state to entertain a federal suit in state court. *Alden v. Maine*, 119 S. Ct. 2240 (1999) (federal overtime statute).

In addition, this Court has proclaimed important limits on federal power under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (patent remedy statute); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (Age Discrimination in Employment Act).

Just as these cases have offered this Court the opportunity to articulate basic *substantive* restraints on federal power in other contexts, the instant proceeding presents this Court with an opportunity to reaffirm the even more fundamental *structural* limits on governmental power imposed by the nondelegation doctrine. The need to reinvigorate the nondelegation doctrine is especially acute because that doctrine restrains not only *legislative* power – by preventing Congress from abdicating its responsibility for basic policy choices – but also *executive* authority, by preventing agencies from exercising the power to "make law."

I. THE NONDELEGATION DOCTRINE VINDICATES IMPORTANT PRINCIPLES OF GOVERNMENT ACCOUNTABILITY.

Under Article I and the separation of powers, "the lawmaking

function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). "Legislative power is nondelegable. Congress can no more 'delegate' some of its Article I power to the Executive than it could 'delegate' some to one of its committees. What Congress does is to *assign responsibilities* to the Executive . . . ." *Id.* at 777 (Scalia, J., concurring in part and concurring in the judgment). The distinction is between impermissible delegation of *lawmaking* functions and permissible delegations of responsibility to *execute* or *administer* the laws:

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Loving, 517 U.S. at 758-59 (quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892)). The nondelegation doctrine mandates that Congress provide, at the very least, an "intelligible principle" to guide the exercise of power conferred on another branch. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Only then is the executive able, as Chief Justice Marshall expressed it, "to fill up the details" under the general provisions made by the legislature. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving*, 517 U.S. at 771.

In a series of decisions which remain governing precedent today, this Court has established important limits on the power of Congress to delegate authority to regulatory agencies. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), this Court invoked the nondelegation doctrine to invalidate an

Executive Order regulating interstate shipments of oil under the National Industrial Recovery Act. The Court held that the Act "establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. . . . So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935), this Court invalidated a statute purporting to delegate the authority to adopt codes of industrial conduct implementing the capacious standard of "fair competition." This Court opined that "[t]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. As Justice Cardozo put it, the legislation exemplified "delegation running riot," which created a "roving commission to inquire into evils and upon discovery correct them." *Id.* at 551, 553 (concurring opinion).

And in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), this Court applied *Schechter Poultry* to strike down a provision of the Bituminous Coal Conservation Act of 1935 delegating power to fix maximum hours of labor and minimum wages.

These cases remain governing precedent. Indeed, this Court has often applied the nondelegation doctrine to give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). In *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974), for example, this Court cited *Schechter Poultry* with approval to support a narrow construction of a federal statute empowering the Federal Communications Commission to impose and collect certain fees from cable operators. The Court opined that serious constitutional questions would be raised by a congressional delegation of general taxing authority to an administrative agency. *Id.*

In *Greene v. McElroy*, 360 U.S. 474 (1959), this Court refused to find an implicit congressional delegation of authority to the Department of Defense to administer a constitutionally questionable security clearance program. In the absence of a specific delegation, the agency was not empowered to act: "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* at 507; *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) (refusing to construe federal legislation as delegating to the Secretary of State the power to deny passports to persons refusing to disclose whether they had ever been Communists). Similarly, in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976), this Court held that the United States Civil Service Commission could not rely on foreign policy objectives in defending a regulation denying civil service jobs to resident aliens because Congress had not delegated foreign policy responsibilities to the Commission.

Moreover, Justice (now Chief Justice) Rehnquist recognized the continuing relevance of nondelegation principles in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), which invalidated an occupational benzene standard promulgated under the Occupational Safety and Health Act of 1970:

> [M]y colleagues manifest a good deal of uncertainty, and ultimately divide over whether the Secretary produced sufficient evidence that the proposed standard for benzene will result in any appreciable benefits at all. This uncertainty, I would suggest, is eminently justified. . . . I would also suggest that the widely varying opinions of [my colleagues] demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.

Id. at 672 (Rehnquist, now C.J., concurring in the judgment). Canvassing the legislative history, Chief Justice Rehnquist concluded that it "contains nothing to indicate that the language 'to the extent feasible' does anything other than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory." *Id.* at 681-82; *see also American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, now C.J., dissenting) (reiterating that the OSH Act was an improper delegation).

In recent years, this Court has invalidated at least four additional delegations of legislative authority. In *INS v. Chadha*, 462 U.S. 919 (1983), this Court held that Congress may not delegate power to one or even both of its Houses. In *Bowsher v. Synar*, 478 U.S. 714 (1986), this Court held that Congress may not delegate authority over other than purely internal matters to an officer answerable to it. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), this Court held that Congress may not delegate decisionmaking authority to an airport "board of review" composed of nine members of Congress.

Most recently, and perhaps most significantly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court held that Congress may not empower the President to exercise a line item veto. Although this Court did not explicitly address the question whether the statute impermissibly delegated to the President the quintessentially legislative power to choose policy ends, *id.* at 448, the Court opined that the statute improperly "authorize[d] the President himself to effect the repeal of laws, *for his own policy reasons*," and that "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id.* at 444, 445 (emphasis added); *see also Chicago v. Morales*, 527 U.S. 41 (1999) (holding violative of due process an ordinance delegating police unguided discretion to order those "loitering" in public with "gang members" to disperse or be prosecuted criminally); *AT&T Corp.*

v. Iowa Util. Bd., 525 U.S. 366, 388 (1999) (invalidating FCC's interpretation of network element "unbundling" requirements of 1996 federal Telecommunications Act because agency construction failed to contain "limiting standards"); *Kolender v. Lawson*, 461 U.S. 352, 358, 359 (1983) (holding that "a legislature [must] establish minimal guidelines to govern law enforcement" and may not "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat").

II. THE NEED FOR THE NONDELEGATION DOCTRINE IS MORE ACUTE THAN EVER.

The principles that lie at the heart of the nondelegation doctrine remain at least as relevant today as they were when this Court decided *Panama Refining* and *Schechter Poultry*. Indeed, those principles are timeless. Quoting Montesquieu, James Madison wrote in Federalist 47: "When the legislative and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." THE FEDERALIST No. 47, at 303 (Clinton Rossiter ed., 1961). John Locke similarly expressed the view that "[t]he power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws and place it in other hands." John Locke, TWO TREATISES OF GOVERNMENT 408-09 (2d Treatise, New American Library 1965).

Limits on delegations of power are necessary to foster the political processes that check congressional action. Open-ended delegations are objectionable because they permit responsibility for government action to pass out of the hands of Congress and thereby undermine this electoral check. As Congressman Levitas once acknowledged: "When hard decisions have to be made, we

pass the buck to the agencies with vaguely worded statutes." 122 Cong. Rec. H10,685 (Sept. 21, 1976). One of his colleagues added: "[T]hen we stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, 'Hey, it's not me. We didn't mean that. We passed this well-meaning legislation . . . .'" *Id.* at H10,673 (statement of Rep. Flowers). Justice Brennan trenchantly observed: "[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive to the same degree to the people." *United States v. Robel*, 389 U.S. 258, 276 (1967) (concurring opinion). In short, "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. at 452 (Kennedy, J., concurring); *see also McGautha v. California*, 402 U.S. 183, 250 (1971) (Brennan, J., dissenting) (basic policy choices must "be made by a responsible organ of state government. For if they are not, the very best that may be hoped for is that state power will be exercised, not upon the basis of any social choice made by the people of the State, but instead merely . . . at the whim of the particular state official wielding the power").

Moreover, apart from enabling Congress to pass the buck on difficult choices, broad delegations allow agencies to aggrandize power in an impermissible manner, as demonstrated by EPA's own experience.[2] The checks and balances built into Article I are

---

[2] For recent EPA actions that have been held in excess of the agency's authority or otherwise illegal, see, e.g., *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000) (vacating rule providing for "early cessation" program for combustion of hazardous waste because EPA failed to establish that program would have environmental or health benefits); *American Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (vacating regulation of oil-bearing waste waters from crude oil refineries as "solid wastes," in the absence of proper justification by EPA); *Association of Battery Recylers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (reversing EPA's attempt to regulate "in-process secondary materials" due to agency's improper interpretation of

"key elements of the constitutional scheme to preserve individual liberty." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708 (1997); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in [Article I], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

Agencies, however, are able to issue rules with the force of law without complying with the requirements of bicameralism. *See, e.g., Chadha*, 462 U.S. at 986-87 (White, J., dissenting) ("There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. . . . [However,] the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature."). As a result, unbridled delegations improperly leave important choices to administrative processes not subject to the lawmaking prerequisites of Article I and not always open to inputs from affected groups. Agencies are able to follow their own agendas, and open-ended mandates make meaningful

---

statutory term and vacating rule providing for test to determine toxicity of manufactured gas plant waste); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside EPA's "periodic monitoring guidance" for failure to follow proper rulemaking procedure); *Chlorine Chem. Council v. EPA*, 206 F.3d 1286 (D.C. Cir. 2000) (vacating chloroform standard under Safe Drinking Water Act as arbitrary and capricious and in excess of statutory authority); *Lignite Energy Council v. EPA*, No. 98-1525, 1999 U.S. App. LEXIS 26263 (D.C. Cir. Sept. 21, 1999) (summarily vacating boiler regulations as "seriously deficient"); *American Petroleum Inst. v. EPA*, 198 F.3d 275 (D.C. Cir. 1999) (holding that EPA exceeded its statutory authority, which permitted states to seek prohibition on sale of non-reformulated gasoline in classified non-attainment areas, by promulgating rule that would cover areas not so classified); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998) (vacating rule establishing treatment standard for aluminum process by-product because test for determining compliance with standard was arbitrary and capricious).

judicial review impossible. *See Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, now C.J., concurring) ("[T]he [nondelegation] doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."). Accordingly, some have proposed that Congress adopt a statute under which agency rules would not go into effect without being enacted by Congress. *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793-94 (1984).

Even three decades ago, Judge J. Skelly Wright was moved to comment, after long experience with administrative law appeals, that agency discretion in the United States had become "intolerable." J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 576 (1972). He urged a reinvigoration of the nondelegation doctrine: "There is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of meaningful organic charters for administrative agencies." *Id.* at 584. "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." *Id.* at 585.

Numerous other commentators and scholars have likewise urged a robust role for the nondelegation doctrine. *See, e.g.*, Providing Reorganization Authority to the President, Hearings on H.R. 3131, H.R. 3407, and H.R. 3442 Before the Legislation and Nat'l Security Subcomm. of the House Comm. on Government Operations, 95th Cong. 76-89, 134-44 (1977) (statements of Laurence H. Tribe and Philip B. Kurland) (arguing that a proposed executive branch reorganization authority, which would have authorized the President to consolidate agencies or entirely abolish their functions, would be unconstitutional under the nondelegation doctrine); Kenneth Culp Davis, ADMINISTRATIVE LAW OF THE EIGHTIES 3:1, at 150 (1989) (proposing that the nondelegation doctrine be "reconstituted" and "given new life"); John Hart Ely, DEMOCRACY AND DISTRUST 131 (1980) ("Much of the law is . . . effectively left to be made

by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain. The point is not that such 'faceless bureaucrats' necessarily do a bad job as our effective legislators. It is rather than they are neither elected nor reelected, and are controlled only spasmodically by officials who are.").[3]

---

[3] *See also* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 67 (1982) (suggesting renewed use of nondelegation doctrine because "the idea of a change in constitutional rules governing legislative delegations has acquired a fresh dignity" and it "should inspire a serious dialogue if not imminent action"); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402 (2000) ("*American Trucking* and [*AT&T Corp. v.*] *Iowa Utilities Board*, [525 U.S. 366, 388-89, 392 (1999),] confirm the emergence of a new delegation doctrine that has the potential to shift the terms of the current debate on delegation and democracy. The new doctrine . . . refocus[es] the inquiry on the exercise of delegated lawmaking authority. . . . By requiring agencies to articulate limiting standards, it ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty."); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 352-53 (1987) (urging a "limited revival of the nondelegation doctrine," under which "[i]nitial consideration should be given to reading the statutory authority of the agencies and the President more narrowly if the language permits"); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 989-90 (1999) ("[A] revived delegation doctrine, which requires legislation to include 'intelligible principles' for measuring the scope and not just the goals of legislation, could play a critical role in confining agency discretion and ensuring agency accountability. . . . Properly pursued, the delegation doctrine would ensure that major policy decisions are made by an elected Congress and President, and not an appointive bureaucracy."); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 49-65 (1976) (nondelegation doctrine could be "an effective deterrent to congressional abdication of responsibility"); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 822 (1999) ("The principles underlying the nondelegation doctrine, which keep congressional, presidential, and bureaucratic power cabined and are drawn from each structure's peculiar characteristics, are valuable weapons in the courts' separation of powers arsenal. The

Of particular relevance here, Professor David Schoenbrod has extensively analyzed the Clean Air Act as a case study

---

nondelegation doctrine could move the constitutional balance of power back toward the balance envisioned by the Framers by forcing legislators to make the law and by rendering it more difficult for the executive branch to enlarge its sphere of power."); Theodore J. Lowi, THE END OF LIBERALISM 298 (1969) ("The Court's rule must once again become one of declaring invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation."); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 303 (1987) (arguing for renewal of nondelegation doctrine and observing that " the terms of the delegation from Congress to the agency are so broad, containing such high-flown rhetoric about the goals, that any but an expansive interpretation would be contrary to the spirit of the statute"); Theodore J. Lowi, THE END OF LIBERALISM, THE SECOND REPUBLIC OF THE UNITED STATES 43-63 (1979) (arguing that aspirational statutes like the Clean Air Act and the Occupational Safety and Health Act dictate an ambitious result, such as pollution control, without standards of any kind for accomplishing the stated end, leaving agencies substantial discretion to achieve the stated result, and shifting the balance of power to make policy from the legislature to executive branch agencies); Judge Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977) (nondelegation doctrine "could do much to augment the quality – and effectiveness as a check against arbitrary or unauthorized administrative action – of judicial review in the occasional cases in which Congress ... chooses ... [to delegate] in order to get a bill enacted"); William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 CARDOZO L. REV. 939, 945 (1999) ("The delegation of legislative authority to executive agencies is clearly unconstitutional and should offend those who care about the Constitution."); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 457 (1978) (arguing for stricter standards on delegation, because the "strength of modern government, can [without them, effectively] become a monster which rules with no practical limits on its discretion"); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 403 (broad delegations "weaken[] the legitimacy of administrative government"); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 CARDOZO L. REV. 361, 361 (1999) ("liberty is threatened when the law-making function of government is delegated to unelected, unaccountable bureaucrats").

illustrating the need for a reinvigorated nondelegation doctrine and has concluded that "the Clean Air Act delegates lawmaking authority [to EPA]." David Schoenbrod, *Symposium – The Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives: Delegation and Democracy*, 20 CARDOZO L. REV. 731, 743 (1999). *See generally* David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 61-67 (1993). Schoenbrod explains that the Clean Air Act represents a prime example of Congress' passing difficult policy choices to an agency: "With delegation, the floor fight is avoided because almost all legislators can vote for a bill that calls for clean air and jobs too. That is why the 1970 Clean Air Act passed almost unanimously. Without delegation, . . . [l]egislators have to stand up and be held accountable on the hard choices." Schoenbrod, 20 CARDOZO L. REV., *supra*, at 744-45. Indeed, one of the only contested provisions of the 1970 Clean Air Act related to what Schoenbrod described as the "one true law in the statute" – the congressionally enacted provision requiring new car makers to reduce emissions of three specified pollutants by ninety percent.[4]

The Government contends that the nondelegation doctrine must be "driven by a practical understanding" of "our increasingly complex society, replete with ever changing and more technical problems." Govt. Br. in No. 99-1257, at 21 (quoting *Mistretta*, 488 U.S. at 372). That is precisely the point. As government faces increasingly complex and difficult questions of public policy, the nondelegation doctrine ensures that value-laden policy choices are made by politically accountable legislators rather than faceless bureaucrats.

The need for a vigorous nondelegation doctrine has only been

[4] *See* Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7521(b)(1) (1994)); Schoenbrod, 20 CARDOZO L. REV., *supra*, at 745; Schoenbrod, POWER WITHOUT RESPONSIBILITY, *supra*, at 73.

heightened by the power accorded to administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* announced a rule of deference to administrative decisions with respect to agency interpretations of ambiguous statutes. Judicial deference to agency constructions of "ambiguous" statutory language presents risks to the separation of powers and principles of legislative accountability. An underenforced version of the nondelegation doctrine, in conjunction with *Chevron* deference, would greatly expand the number of statutes containing vague and precatory language within which agencies could "find" ambiguities in ordinary language in order to arrogate to themselves the power to make law. The unfettered power to define as the law of the land any rationally supportable version of what a statute's words *might* mean is the very essence of the legislative authority granted to Congress by Article I.

The distinction between the judicial and administrative functions illustrates the point. Judges interpret the law; they do not write rules or statutes. Judges "make [law] . . . as though they were 'finding' it – discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

Agencies, by contrast, both interpret the law and promulgate regulations with the force of law. If this administrative power is supplemented both with *Chevron* deference and with vague statutory delegations, agencies will be vested with largely unchecked authority to issues rules that reflect their own notions as to what the law should be, without accountability to the electorate and without the ability of the judiciary to engage in meaningful review of agency decisions.

Such agency actions amount to exercises of the power reserved to Congress by Article I. The similarity between agency and legislative action – and the difference between agency lawmaking and judicial interpretation – is illustrated by the principle that agencies, like legislators, cannot bind their

successors. Agencies, like legislatures, "make" rather than "find" law. Thus, this Court has held that a pre-*Chevron judicial* interpretation of a statute is binding on the agency, whereas an earlier *agency* selection of a statutory meaning is *not* binding on successor agencies. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992); *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

The danger is that agencies will seize the fundamental power not merely to say, as courts do, what the law is but also the power to make, as legislatures do, law out of whole cloth. Unless the nondelegation doctrine is taken with renewed seriousness, the bestowal of *Chevron* deference will give agencies such free rein that the process of agency "construction" of statutes will become more akin to the legislative process of literally *constructing* statutes (critically, without Congress' political accountability) than to the interpretive and implementing process in which an agency should rightfully engage. Agencies will thus exercise the power to make the truly basic policy decisions and trade-offs that are properly reserved for Congress under our constitutional system. These decisions will constitute neither the filling of interstitial gaps nor the identification of triggering contingencies, but rather the making of law, plain and simple. The result will be to install administrative agencies as mini-Congresses and mini-judiciaries at the same time.

III. SECTIONS 108 AND 109, AS INTERPRETED BY EPA, ARE INVALID UNDER THE NONDELEGATION DOCTRINE.

The Court of Appeals correctly held that EPA's interpretation of Sections 108 and 109 violates the nondelegation doctrine. For these provisions, as construed by EPA, do not merely authorize the agency to carry out or implement the statutory directives enacted by Congress, but effectively deputize EPA to engage in the sort of fundamental policy choices and balancing of complex

questions of science, law, and social policy that are the very essence of *lawmaking*. In addition, EPA has framed its authority so broadly as to eliminate the possibility of effective judicial review as a restraint on its rulemaking.

Two sections of the Clean Air Act govern the establishment, review, and revision of National Ambient Air Quality Standards (NAAQS). Section 108 (42 U.S.C. § 7408) directs EPA to identify certain pollutants which "may reasonably be anticipated to endanger public health or welfare" and to issue air quality criteria for them. These air quality criteria are to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air."

Section 109 (42 U.S.C. § 7409) directs EPA to propose and promulgate "primary" and "secondary" NAAQS for pollutants identified under Section 108. Those standards may then be reviewed and revised as "appropriate." Section 109(d)(1), 42 U.S.C. § 7409(d)(1). Section 109(b)(1) defines a primary standard as one "the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard, as defined in section 109(b)(2), should "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air."

The statute instructs EPA to use its "judgment" in determining what is "an adequate margin of safety . . . to protect the public health." Section 109(b)(1), 42 U.S.C. § 7409(b)(1). As construed by EPA, Sections 108 and 109 prescribe absolutely no factors or criteria that would constrain the agency. Thus, in administering Sections 108 and 109, EPA is not applying statutory factors prescribed by Congress or, in Chief Justice Marshall's words, "fill[ing] up the details" under the general

provisions made by Congress. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Rather, EPA is making basic policy choices without any meaningful legislative guidance.

Even EPA's own defense of its rules reveals the constitutional flaw and the impossibility of effective judicial review. According to EPA, "nothing in the statute requires [the Administrator] to make any specific 'findings' or to structure her decisionmaking in any particular way" before revising a NAAQS. Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 43 (D.C. Cir. filed Sept. 14, 1998). The Administrator need not even find that her regulatory action is needed to protect against a "significant risk of harm." *Id.* "Nor is EPA required to follow any particular paradigm of decisionmaking." *Id.* at 29. Instead, according to EPA, Section 109 gives the Administrator broad authority to revise a NAAQS to any level that in her judgment reflects a "sufficient" level of risk reduction. *Id.* at 10, 29. "[T]he final choice of a standard is a quintessential policy judgment within the discretion of EPA," even though "[s]uch decisions present complex questions of science, law, and social policy." *Id.* at 28, 29 (internal quotations omitted). Hence, in issuing the rules under review, "EPA made policy judgments . . . concerning the point at which risks would be reduced sufficiently to protect public health with an adequate margin of safety." *Id.* at 10.

EPA believes that ozone, and in all likelihood particulate matter (PM) as well, are nonthreshold pollutants presenting some possibility of adverse health impact (however slight) at any exposure level above zero. *See* Govt. Br. in No. 99-1257, at 14 ("EPA had reasonably assumed, for purposes of the quantitative risk assessment, that there is no 'effects threshold' for the categories of health effects measured."); Ozone Final Rule, 62 Fed. Reg. at 38,863/3 ("Nor does it seem possible, in the Administrator's judgment, to identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects are likely to occur."); National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg.

65,637, 65,651/3 (1996) (proposed rule) ("The single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur.").

The only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero. A standard of zero is impractical, of course, not only because of the unthinkable deindustrialization it would require but also because there are natural background sources of both ozone and PM. Under EPA's interpretation, however, the statute contains no factors at all under which the agency could select a higher exposure level. There are no determinate criteria for drawing lines or for determining how much risk is "too much." EPA is left entirely to its own devices in performing the essentially lawmaking task of selecting an acceptable exposure level. As the Court of Appeals opined, "EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." 175 F.3d at 1037.

EPA's interpretation of Sections 108 and 109 thus shares the same constitutional flaw as the statute invalidated in *Panama Refining*. The relevant provision of the National Industrial Recovery Act of 1933 provided that "[t]he President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder . . . ." 293 U.S. at 406. The purpose of the law was hardly a mystery: to give the President authority to supplement state enforcement efforts by banning shipment of "hot oil" in excess of state allocation decisions. But the statute failed to provide any guidance to the President as to *when* this power should be exercised, or any factors to limit his discretion. "[T]he Congress has declared no policy, has established no standard, has laid down no rule. There

is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." 293 U.S. at 430. In the same way, EPA's construction of Sections 108 and 109 fails to provide the agency with any criteria when it sets a NAAQS above zero.

The constitutional defect in Sections 108 and 109, as interpreted by EPA, also resembles the constitutional flaw identified by Chief Justice Rehnquist in the provision of the OSH Act at issue in *Industrial Union Department, AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). The statute instructed that the Secretary of Labor, "in promulgating standards dealing with toxic materials or harmful physical agents, . . . shall set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health." *Id.* at 612. The OSHA provision, while extreme, in fact provided greater guidance than Sections 108 and 109, because it directed OSHA to consider feasibility, to determine whether an impairment was "material," and to protect the health of each worker. By contrast, the decision of the level at which an NAAQS should be set is, according to EPA, a "policy judgment" within EPA's discretion for which no statutory guideposts need be followed.

In another instructive case, *International Union UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991), the court of appeals held that § 3(8) of the OSHA Act, as interpreted by OSHA, was an unconstitutional delegation of legislative power. Section 3(8) stated that OSHA-ordered safety precautions must be "reasonably necessary or appropriate to provide safe or healthful employment," which OSHA interpreted as providing that, "once a significant risk is found, [the agency is empowered] to require precautions that take the industry to the verge of economic ruin (so long as the increment reduces a significant risk), or to do nothing at all." *Id.* at 1317. The court of appeals held that, thus read, the statute would violate the nondelegation doctrine because it would give OSHA unrestrained power "to roam" at will between "rigor" and "laxity" when issuing workplace safety

rules. *Id.* The court pointed out that the OSHA regulation encompassed all American enterprise, and warned that "'[w]hen the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise.'" *Id.* (citation omitted). The court also noted that giving an agency such unrestrained latitude "leaves opportunities for dangerous favoritism" and thus delegates the "power to decide which firms will live and which will die." 938 F.2d at 1318.

The same concern applies here – but on an even greater scale. Implementation of both the ozone and the particulate standards will cost, according to EPA, close to $47 billion annually – more than the Nation currently spends for all Clean Air Act programs combined.[5] The huge costs that EPA is able to impose in its discretion underscore the danger of the impermissible delegation at issue. The NAAQS standards, like the OSHA regulations in *International Union UAW*, encompass virtually all American enterprise. They are national in scope and will have substantial impacts in virtually every state in the nation. This situation begs for legislative standards that are "correspondingly more precise," 938 F.2d at 1317, so that the agency's tremendous impact on the country through its rulemaking are constitutionally authorized.

IV. EPA'S DEFENSES OF ITS STATUTORY CONSTRUCTION ARE FLAWED.

The Government insists that Sections 108 and 109, as construed by EPA, satisfy the nondelegation doctrine because "EPA considers, among other public factors, the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of

---

[5] *See* Innovative Strategies and Economics Group, EPA, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule 13-2 (1997); Office of Air and Radiation, EPA, The Benefits and Costs of the Clean Air Act: 1970 to 1990, at ES-2 (1997).

the sensitive populations at risk." Govt. Br. in No. 99-1257, at 5.

But this argument cannot possibly salvage EPA's interpretation of Sections 108 and 109. The factors cited by the Government have been voluntarily adopted by EPA; they are not contained in Sections 108 and 109, either expressly or by any process of implication that could fairly be attributable to Congress. *See* Ozone Final Rule, 62 Fed. Reg. at 38,883/2; EPA, Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper, at II-2 (July 1996).

EPA has simply selected these factors, and has chosen not to adopt others, as a matter of its own judgment. EPA is entirely free, under *Chevron*, to abandon these factors or otherwise to change its own interpretive views of the statute, so long as it provides an explanation for its altered position. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In this very case, the D.C. Circuit on rehearing noted the risk that EPA might change its mind in a future rulemaking. *See* 195 F.3d at 7. Plainly, an agency's self-imposed restraints cannot satisfy the requirements of the nondelegation doctrine that *Congress* adopt adequate limits on agency action.

In any event, the factors articulated by EPA fail to provide decisional principles adequate to guide the Administrator's discretion. For example, EPA explained that its decision to select an 0.08 ppm level for the ozone NAAQS rather than a level of 0.07 ppm rested on its judgment that effects are less certain and less severe at lower levels of exposure:

> The most certain O[3]-related effects, while judged to be adverse, are transient and reversible (particularly at O[3] exposures below 0.08 ppm), and the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects.

Ozone Final Rule, 62 Fed. Reg. at 38,868/2. But this analysis is virtually a tautology: higher concentrations of pollutants inevitably inflict a greater quantum of harm on public health, with a higher probability, than do lower concentrations. According to the record before EPA, there was nothing magical about the level of 0.07 ppm; even "group mean responses in clinical studies at . . . 0.08 ppm are typically small or mild in nature." 61 Fed. Reg. at 65,728. Further, EPA explained that the transient and reversible nature of health effects (such as those at 0.07 ppm) did not mean they were harmless: "On the other hand, repeated inflammatory responses associated with exposure to O[3] over a lifetime have the potential to result in damage to respiratory tissue such that individuals later in life may experience a reduced quality of life." *Id.*

In sum, EPA failed to explain why the cutoff point should be 0.08 ppm; why the risks entailed by exposure below that level were not worth preventing; or why the risks entailed by exposure above that level were not worth accepting. More importantly, nothing in Sections 108 and 109 provided a basis for EPA to make those determinations.

In this regard, the Government's newfound claim that 0.07 ppm represented "the level at which EPA's exposure assessment showed that exposures of public health concern were 'essentially zero,'" Govt. Br. in No. 99-1257, at 31-32 (quoting 61 Fed. Reg. at 65,728, 65,730), is misleading. The cited passage explains not that health effects would be absent but rather that "[e]stimated exposures to O[3] concentrations ≥ 0.08 ppm . . . are essentially zero at the 0.07 ppm standard level for most areas evaluated in the exposure analyses for the at-risk population of outdoor children." In other words, a NAAQS of 0.07 ppm would mean that outdoor children would not be exposed to ozone concentrations ≥ 0.08 ppm. However, such a conclusion does not imply that health effects at a NAAQS of 0.07 ppm would be

"zero." In its administrative decision, EPA reaffirmed that "it is likely that 'O[3] may elicit a continuum of biological responses down to background concentrations.' Thus, in the absence of any discernible threshold, it is not possible to select a level below which absolutely no effects are likely to occur. Nor does it seem possible, in the Administrator's judgment, to identify a level at which it can be concluded with confidence that no 'adverse' effects are likely to occur." 61 Fed. Reg. at 65,727. Indeed, "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O[3] exposures, including O[3] concentrations below the level of the current standard, with no discernible threshold at or below this level." *Id.* at 65,727-28. "Consequently, . . . 'the selection of a specific level . . . is a policy judgment.'" *Id.* at 65,727.

The Government also suggests that the delegation here is no more expansive than those upheld by this Court in such cases as *Mistretta v. United States*, 488 U.S. 361 (1988), *United States v. Touby*, 500 U.S. 160 (1991), and *Loving v. United States*, 517 U.S. 748 (1996). That suggestion is untenable. In fact, the delegation in this case is far beyond any upheld by this Court under the modern nondelegation doctrine. In sustaining the sentencing guidelines in *Mistretta*, for example, this Court noted the extensive constraints imposed by Congress cabining the Sentencing Commission's discretion and confining the Commission to interstitial decisionmaking.[6] By contrast,

[6] "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." 488 U.S. at 379 (internal citation omitted). Congress set out three "goals" for the Commission and further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate. *Id.* at 374. Congress instructed the Commission that sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maximums. Congress also required that for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2). Moreover, Congress directed the Commission to use current average sentences "as a starting point" for its structuring of the sentencing ranges. § 994(m). To guide the Commission in its formulation of offense categories, Congress directed the consideration of seven factors: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense. §§ 994(c)(1)-(7). Congress also set forth eleven factors for the Commission to consider in establishing categories of defendants, including the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. § 994(d)(1)-(11). Congress also prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders," § 994(d), and instructed that the guidelines should reflect the "general inappropriateness" of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors, § 994(e).

Sections 108 and 109, as interpreted by EPA, contain no such limits.

Similarly, in *United States v. Touby*, 500 U.S. 160, 165-66 (1991), Congress provided the requisite constraint in a federal narcotics statute that required the Attorney General, when exercising her delegated power to invoke a special expedited procedure for designating a new narcotic as an illegal controlled substance, to find that doing so was "necessary to avoid an imminent hazard to the public safety." *Id.* at 166. This Court stressed that this "imminent hazard" requirement "meaningfully constrain[ed]" the government, because in making such a determination it was "required to consider" a list of statutorily specified factors that placed "a special emphasis" on the details of the "current pattern" and "scope, duration and significance" of

the "risk" that abuse of the designated drug posed to "the public health." *Id.* Here, there is no such constraint on EPA.

In *Loving v. United States*, 517 U.S. 748 (1996), this Court upheld a delegation to the President to prescribe aggravating factors for capital punishment in courts-martial, but only because of the special context of the military and the traditional role of the President as commander in chief of the armed forces.[7] Moreover, this Court warned that "[h]ad the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight." *Id.* at 772. Unlike the President, EPA has no independent constitutional authority of its own.

The remaining aspects of the Government's argument are no more persuasive. The Government insists that Sections 108 and 109 satisfy the nondelegation doctrine because "[t]he Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow . . . ." Govt. Br. in No. 99-1257, at 25. Yet EPA itself has taken the view that, with respect to the central issue in dispute – the level at which a NAAQS is

---

[7] *See* 517 U.S. at 772-73 ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter . . . .' 'The military constitutes a specialized community governed by a separate discipline from that of the civilian,' and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline.") (citations omitted). Even so, this Court identified an important "principle limiting the President's discretion to define aggravating factors for capital crimes in Article 36: namely, the directive that regulations the President prescribes must 'apply the principles of law ... generally recognized in the trial of criminal cases in the United States district courts . . . .'" *Id.* at 772.

to be set – "the final choice of a standard is a quintessential policy judgment within the discretion of EPA." Final Brief of EPA in *American Trucking Assns., Inc. v. EPA*, No. 97-1441, at 29 (D.C. Cir. filed Sept. 14, 1998). No amount of consultation with a body of scientific experts or procedural review by the courts can alter the absence of adequate congressional guidance with respect to the fundamental policy choice ultimately made by EPA. Indeed, the open-ended nature of EPA's interpretation of Sections 108 and 109, if upheld, would prevent meaningful judicial review. EPA itself contended in the D.C. Circuit that there are no determinate standards by which a court may overturn the exercise of the agency's judgment.

According to the Government's logic, Congress could create a single administrative agency with jurisdiction over all aspects of the national economy – from consumer safety to energy policy, environmental protection, and deceptive advertising – and direct it to adopt "appropriate rules," so long as the agency were obliged to consult a body of experts and engage in specified procedures for public comment and judicial review. Such an agency would, just like EPA in this case, operate according to a legal standard and under mechanisms for procedural review. But the very concept of such an omnipotent bureaucracy is utterly foreign to Article I and the separation of powers.

In *Lopez*, this Court recognized limits on Congress' commerce power in part because of a realization that the Government's constitutional theory knew no bounds. *See* 514 U.S. at 564 ("Under the theories that the Government presents, . . . it is difficult to perceive any limitation on federal power . . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

Precisely the same reasoning is applicable here: if this delegation passes muster, then anything goes. If EPA's interpretation of Sections 108 and 109 were upheld, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. . . .

Instead of performing its lawmaking function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." *Id.*[8]

CONCLUSION

The judgment of the Court of Appeals invalidating EPA's interpretation of Sections 108 and 109 should be affirmed.

Respectfully submitted.

---

[8] Even if the statute were construed, as GE urged in its *amicus* brief in No. 99-1426, to require EPA to "consider" compliance costs and risk trade-offs in setting a NAAQS, serious nondelegation questions would remain. For Congress has provided no guidance to EPA with respect to a host of scientific and policy issues, apart from consideration of costs, in judging the significance of risks. Further, EPA – which has strenuously resisted any claim that it is obliged to consider costs – has never identified any statutory limits to agency discretion in selecting among various potential *means* of considering and weighing costs, alternatives that differ so fundamentally as to reflect different *ends* altogether. The Court of Appeals' judgment vacating the agency action under review must accordingly be affirmed even if this Court holds that Sections 108 and 109 of the Clean Air Act require EPA to take costs and risk trade-offs into account.

BENJAMIN W. HEINEMAN, JR.
BRACKETT B. DENNISTON III
STEPHEN D. RAMSEY
MATTHEW O. TANZER
GENERAL ELECTRIC COMPANY
3135 Easton Turnpike
Fairfield, CT 06431
(203) 373-2453

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
THOMAS C. GOLDSTEIN
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

Counsel for Amicus Curiae

September 11, 2000

(28)

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

IN THE

Supreme Court of the United States

BROWNER, EPA ADMINISTRATOR,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER IN SUPPORT OF RESPONDENT

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

September 11, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

25pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. REQUIRING EPA TO IDENTIFY LIMITING CRITERIA IN ITS AUTHORITY UNDER THE CLEAN AIR ACT IS CONSISTENT WITH THE NONDELEGATION DOCTRINE AND ESTABLISHED PRECEDENTS 4

A. The Nondelegation Doctrine's Requirement That Agency Authority Be Confined By Some "Intelligible Principle" Is Applied Pragmatically 5

1. The Nondelegation Doctrine Is Applied Indirectly To Narrow Interpretations Of Agency Authority 6

2. The Nondelegation Doctrine Is Applied Indirectly Through The "Clear Statement" Requirement 10

B. As Interpreted By EPA, Section 109 Of The Clean Air Act Would Allow EPA To Set NAAQS Without Reference To Any "Determinate Criterion" 11

C. Remanding The Matter To EPA To Identify The Criteria For Determining The Level Of Nonthreshold Pollutants Is Required By *Chevron* 13

TABLE OF CONTENTS—Continued

	Page
II. REVIEW OF LEGISLATIVE RULES UNDER THE ADMINISTRATIVE PROCEDURE ACT IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE	15
III. EPA DID NOT RECOGNIZE ANY LIMITATIONS ON ITS DISCRETION TO SET NAAQS FOR OZONE AND PARTICULATE MATTER	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	Page
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	3, 6, 7
Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally, 337 F. Supp. 737 (D.D.C. 1971)	9, 17
American Power & Light Co. v. SEC, 329 U.S. 90 (1946)	5, 9
Ashwander v. TVA, 297 U.S. 288 (1936)	6
AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 336 (1999)	8, 9, 14
Buttfield v. Stranahan, 192 U.S. 470 (1904)	5
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	3
Central Forwarding, Inc. v. ICC, 698 F.2d 1266 (5th Cir. 1983)	13
Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)	14, 15
Cliffdale Assocs., 103 F.T.C. 110 (1984)	7
Clinton v. City of New York, 524 U.S. 417 (1998)	5
Dickinson v. Zurko, 527 U.S. 150 (1999)	17
FDA v. Brown & Williamson Co., 120 S.Ct. 1291 (2000)	5
Greene v. McElroy, 360 U.S. 474 (1959)	11
Haig v. Agee, 453 U.S. 280 (1981)	11
Hoctor v. USDA, 82 F.2d 165 (7th Cir. 1996)	14
Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980)	8
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	9
J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)	5
Jones v. United States, 120 S.Ct. 1904 (2000)	5
Kent v. Dulles, 357 U.S. 116 (1958)	3, 10

TABLE OF AUTHORITIES—Continued

	Page
Lead Industries Ass'n, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980)	1
Marks v. United States, 430 U.S. 188 (1977)	8
MCI Telecommunications Corp. v. AT&T, 512 U.S. 218 (1994)	9
Mistretta v. United States, 488 U.S. 361 (1989)	5
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983)	16
National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974)	7
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	3
Rust v. Sullivan, 500 U.S. 173 (1991)	11, 15
Touby v. United States, 500 U.S. 160 (1991)	8, 9, 12
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)	5
Yakus v. United States, 321 U.S. 414 (1944)	17
Zemel v. Rusk, 381 U.S. 1 (1965)	7

Statutes and Regulations:

5 U.S.C. § 706(2)(A)	15, 16
15 U.S.C. §§ 41-57c	7
26 U.S.C. § 501(c)(3)	1
42 U.S.C. § 7409	1
62 Fed. Reg. 38,652 (July 18, 1997)	*passim*
62 Fed. Reg. 38,856 (July 18, 1997)	*passim*

Miscellaneous:

CASAC Letter to Carol Browner re: Ozone (November 1995) in Ozone JA 238	18

TABLE OF AUTHORITIES—Continued

	Page
FTC, *Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction*, 4 Trade Reg. Rep. (CCH) ¶13,203 (Dec. 17, 1980)	7
FTC, *Policy Statement on Deception*, 4 Trade Reg. Rep. (CCH) ¶13,205 (Oct. 14, 1983)	7
Peter Strauss et al., *Cases and Comments on Administrative Law* (9th ed. 1995)	5
A. Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997)	6

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] Its Regulatory Studies Program (RSP) is dedicated to advancing knowledge of administrative regulations and their effect on society. Through its Public Interest Comment Project, RSP submits independent analyses of proposed rules in agency rulemaking proceedings. It filed two such analyses with EPA on the proposed National Ambient Air Quality Standards for ozone and particulate matter during the comment period. Those comments identified the absence of any principled standards in EPA's selection of the levels of permissible ozone and particulate matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal issue in this case is whether the Environmental Protection Agency's (EPA) interpretation of Section 109 of the Clean Air Act (CAA), 42 U.S.C. § 7409, is consistent with the constitutional doctrine that congressional delegations of law-making power must state an "intelligible principle" confining agency discretion within cognizable grounds.[2] The CAA was interpreted by both EPA and the court below, pursuant to *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert.

---

[1] The statements in this brief do not represent an official position of George Mason University. The parties' written consents to the filing of this brief have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. Counsel acknowledge the contributions of Wendy L. Gramm, Director, and Susan E. Dudley, Senior Research Fellow, at the Mercatus Center, to the writing of this brief.

[2] We do not address either the "ripeness" or the "subpart 2" issues raised by petitioner.

denied, 449 U.S. 1042 (1980)(*Lead Industries*), as prohibiting consideration of "any factor other than 'health effects relating to pollutants in the air'" in setting National Ambient Air Quality Standards (NAAQS) for ozone or particulate matter (PM). Pet. Cert. App. at 15a.

As a consequence, EPA's rules setting permissible ozone and particulate matter levels did not openly examine cost, risk or other adverse effects of the standards despite a clear correlation between such implementation "costs" and overall health effects on the public. See generally Mercatus Amicus Br. (99-1426) at 11-23; General Electric Company Amicus Br. (99-1426) at 4-18. Nor did the ozone and PM rules identify a specific standard or measurable factor under the CAA as the basis for the selected NAAQS levels. Instead, EPA asserted that Congress delegated to it unlimited "discretion to make the 'policy judgment'" of where the standard should be set. Pet. Cert. App. at 12a; see 62 Fed. Reg. 38,856, 38,869 (July 18, 1997); 62 Fed. Reg. 38,652, 38,691 (July 18, 1997). Under this framework, however, there is no principle or "determinate criterion" that EPA must satisfy in demonstrating that the levels it selected were authorized. Thus, the court of appeals found that EPA's interpretation of CAA §109, if not corrected, would raise serious questions under the nondelegation doctrine.

EPA argues that the decision of the court below, which states that EPA should interpret the CAA so as to avoid violation of the nondelegation doctrine, is "novel," "unprecedented," "contrary to the purpose of the delegation doctrine" and without any "basis in this Court's precedents." Pet. Br. at 18, 26 & 28; see also Pet. Cert. Br. at 9 (court of appeals' decision a "radical departure" from 65 years of consistent nonapplication of the nondelegation doctrine). In fact, however, it is EPA that has radically misread both this Court's application of the nondelegation principle and the lower court's adherence to clear precedent. All that the lower court held is that EPA's interpretations of the

CAA cannot disregard the nondelegation doctrine in reading § 109.

EPA acknowledges, as it must, that the nondelegation doctrine continues to be a viable principle underlying basic constitutional jurisprudence governing congressional grants of authority to administrative agencies. It cannot deny that both this Court and lower courts have adopted narrow readings of agency organic statutes where necessary to avoid constitutional invalidity under the nondelegation doctrine. Constitutional principles are frequently preserved by indirect means, see, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958), but this less confrontational approach does not alter the importance or effect of the constitutional requirement.

The limited application of the nondelegation doctrine to read statutes narrowly is a reflection of the Court's prudent use of the rule.[3] However, this restrained use does not contradict the doctrine's importance as a foundational principle governing agency authority or its continuing validity.

Thus, despite EPA's hyperbole, the only distinctive aspect of the ruling below is not that the court of appeals construed the agency's reading of the CAA as raising "serious constitutional issues," but rather that the court did not interpret the CAA for itself. The lower court recognized that, as interpreted by EPA, the CAA did not spell out the requisite standards by which EPA was to set appropriate NAAQS levels. Thus, it remanded the matter to EPA for it to decide in the first instance whether another permissible interpretation was possible and reasonable. Pet. Cert. App. at 14a, 57a-58a. That deferential approach is

---

[3] This Court has applied the "strong form" of the nondelegation doctrine to overturn legislation on only three occasions: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (*Panama Refining*); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (*Schechter Poultry*); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936).

commanded by *Chevron* where, as here, the statute is "silent or ambiguous" on the "precise question at issue," and it allows "the agency an opportunity to extract a determinate standard on its own." Pet. Cert. App. at 14a.

ARGUMENT

I. REQUIRING EPA TO IDENTIFY LIMITING CRITERIA IN ITS AUTHORITY UNDER THE CLEAN AIR ACT IS CONSISTENT WITH THE NONDELEGATION DOCTRINE AND ESTABLISHED PRECEDENTS

Contrary to EPA's overheated rhetoric, the court below did not invalidate the CAA or interfere with the agency's broad authority to regulate air quality. Nor did the court expand or alter the traditional use of the nondelegation doctrine when it rejected EPA's interpretation of the CAA as authorizing EPA to select any level based simply on its "policy judgment." 62 Fed. Reg. at 38,869 (ozone rule); *id.* at 38,691 (PM rule). Rather, the lower court held that EPA must first determine whether the statute can reasonably be read more narrowly before adopting such an extreme interpretation of § 109. The lower court thought such an interpretation was possible—e.g., by development, among other possibilities, of a "generic unit of harm." Pet. Cert. App. at 16a. As we and others have demonstrated, the statutory language does not prohibit EPA's reliance on sound decision making standards such as health-health, wealth-health and cost-benefit measures. See, e.g., Mercatus Amicus Br. (99-1426) at 12-22.

This ruling by the court of appeals is remarkable only for its ordinariness in applying the nondelegation doctrine in a limited sphere. It holds that it is the agency's responsibility to interpret the statute in a manner that is consistent with the principles of the nondelegation rule and to avoid unchanneled delegations of discretion to the agency. This ruling is buttressed by the undisputed principle of statutory construction that statutes should be

read so as to avoid constitutional confrontations. See, e.g., *Jones v. United States*, 120 S.Ct. 1904, 1911 (2000); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).[4]

A. The Nondelegation Doctrine's Requirement That Agency Authority Be Confined By Some "Intelligible Principle" Is Applied Pragmatically

EPA does not dispute the core requirement of the nondelegation doctrine that legislative authority delegated by Congress to the executive must state "intelligible principles," *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), by which the agency is given a "primary standard" to guide its action. *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); see *Clinton v. City of New York*, 524 U.S. 417, 443-44 (1998). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Despite these strong statements, the nondelegation doctrine has not been applied *directly* to invalidate enabling legislation since 1936. See n. 3 *supra*. That does not mean that the doctrine has been abandoned. It is still a principled underpinning of basic separation of powers jurisprudence. In point of fact, its presence and *indirect* application have had an "important and continuing 'shadow' impact" on the reading and review of legislative delegations of authority to administrative agencies. Peter Strauss et al., *Cases and Comments on Administrative Law*

---

[4] Such applications also are consistent with probable congressional intent because it is unlikely that the legislature intended to grant such unbridled power to a single administrator whose decisions are subject to deferential review. See *FDA v. Brown & Williamson Co.*, 120 S.Ct. 1291, 1314 (2000) (citing Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).

92 (9th ed. 1995). This indirect application usually results in a determination either that the agency discretion is narrower than claimed or that the claimed authority was not delegated because there was no clear statement of legislative intent to do so. Both approaches use the doctrine as an interpretive tool in order to avoid addressing constitutional objections. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); A. Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948-49 (1997).[5]

1. The Nondelegation Doctrine Is Applied Indirectly To Narrow Interpretations Of Agency Authority

The seeds of this more limited, indirect application of the nondelegation doctrine are contained in its most celebrated case, *Schechter Poultry*. There, this Court contrasted the uncanalized (see 295 U.S. at 551, Cardozo, J., concurring) delegation of authority given the President to control wages and prices under the National Industrial Recovery Act with the broad authority given to the Interstate Commerce Commission and the Federal Radio Commission to regulate in the public interest, convenience or necessity and to the Federal Trade Commission to prohibit unfair or deceptive trade practices. *Id.* at 538-40, 552. In the case of the FRC and FTC, the delegations were upheld because the agencies' authority was restricted by specialized procedures, common law antecedents establishing basic substantive principles, and limited coverage to specific industries or business practices. *Id.* at 539-40.[6]

[5] EPA's argument that the lower court "incorrectly" applied the nondelegation doctrine to rule that the CAA § 109, as interpreted, was invalid, Pet. Br. at 18, misreads the court's holding. The court of appeals did not hold that the CAA was unconstitutional or that it should be so interpreted. Instead, what it said is that there appeared to be other interpretations of the CAA available which would incorporate the required "intelligible principle" and that the agency was to determine whether such a ruling was consistent with its view of the Act. Pet. Cert. App. at 14a, 16a-17a.

The primary applications of the nondelegation doctrine by this Court interpreting agency authority narrowly in order to avoid finding an unconstitutional delegation of power are:

- *Zemel v. Rusk*, 381 U.S. 1 (1965): upholding validity of area restrictions on passports after narrowing the Secretary of State's discretion by determining that the enabling act "authorizes only those passport refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.' [quoting *Kent v. Dulles, supra*] So limited, the Act does not constitute an invalid delegation." *Id.* at 18.
- *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974): reviewing agency authority to assess operating cost fees against regulated parties at a level reflecting "direct and indirect cost[s] to the Government, value to the recipient, [and] public policy." *Id.* at 338. The Court acknowledged that "if [the public policy terms were] read literally" the statute would permit the FCC to act in the "manner of an Appropriations Committee of the House." *Id.* at 341. Thus, it upheld the delegation only after "read[ing] the Act narrowly to avoid [these] constitutional problems." *Id.* at 342; see *id.* (quoting from *Schechter Poultry* that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").

[6] Fulfilling the Court's expectations, over time, the meaning of this enabling authority has been narrowed further as the problems they address were more fully understood. See, e.g., FTC, *Policy Statement on Deception*, 4 Trade Reg. Rep. (CCH) ¶13,205 at 20,911-12 (Oct. 14, 1983) (stating elements applicable to deception cases); *Cliffdale Assocs.*, 103 F.T.C. 110 (1984) (same); FTC Act Amendments of 1994, 108 Stat. 1691, 95 (codified at 15 U.S.C. §§ 41-57c) (definition of "unfair acts and practices" borrowed from FTC, *Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction*, 4 Trade Reg. Rep. (CCH) ¶13,203 (Dec. 17, 1980)).

- *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (*Benzene*): overturning interpretation of the OSH Act and holding that regulation of airborne carcinogens at the lowest level feasible requires a showing of "significant risk." 415 U.S. at 614-15. The plurality justified this narrower interpretation as follows:

> [The Government's interpretation of] the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in [*Schechter Poultry* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored. (*Id.* at 646)[7]

- *Touby v. United States*, 500 U.S. 160 (1991): upholding Attorney General's discretion to temporarily add or remove psychoactive drugs as prohibited or controlled substances only after the Government conceded limits on that discretion by requiring further testing before additions could be made to the most harmful category and by acknowledging that judicial review would be available as a defense to a criminal prosecution.

- *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 336 (1999) (*Iowa Utilities*): reversing FCC's reading of its statutory

[7] Then-Justice Rehnquist concurred expressly relying on a direct application of the nondelegation doctrine to invalidate the first sentence of § 6(b)(5) of the Act. *Id.* at 672. The plurality's narrower application of the doctrine is the ruling of the case. See *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'" quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Thus, contrary to Judge Silberman's dissent from the denial of rehearing *en banc*, Pet. Cert. App. at 93a, the narrower holding of the *Benzene* plurality is a binding ruling and not a "makeweight[] tossed into the analysis, in light of Justice Rehnquist's concurrence, to help justify the result." *Id.*

authority under the Telecommunications Act of 1996, 110 Stat. 56, codified as amended 47 U.S.C. § 251, of the conditions on which local exchanges were to be open to competition. The agency's interpretation of the statutory terms ("necessary" and "impair") was unreasonable under *Chevron* step two because the FCC had failed to supply any "limiting standard, rationally related to the goals of the Act," 525 U.S. at 388, and because it permitted private parties rather than the FCC to set the content of the law. *Id.* at 389. Although the Court did not cite any nondelegation cases as support, these rationales are the twin touchstones of *Schechter Poultry* (see pp. 6-7, *supra*).[8]

One influential lower court case, *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J., for 3-judge court) (*Amalgamated Meat Cutters*), also is noteworthy for identifying restrictions within a statute whose broad delegation of authority otherwise would have been invalid. There the court upheld non-wartime wage and price controls only after finding that the administrative authority was confined by substantive price control precedents and after incorporating other process restrictions. *Id.* at 758 (administrative "standards once developed limit the latitude of subsequent executive action"). The court further noted that "there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective." *Id.* at 759. See aiso *American*

[8] Other decisions by this Court similarly have read statutes narrowly in order to avoid finding that an agency's authority includes the power to change its mandate—albeit without specifically relying upon the nondelegation doctrine. See *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225 (1994) (reading word "modify" narrowly to reject FCC reading of tariff filing requirements as giving it sole discretion "to make even basic and fundamental changes in the scheme created" by Congress); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Power & Light Co. v. SEC, 329 U.S. at 104 (upholding provision in the Public Utility Holding Company Act, 15 U.S.C. § 79k(b)(2), that prohibited "unduly complicated corporate structures and inequitable distributions of voting power" against a nondelegation doctrine attack because, looking at the "purpose of the Act, its factual background and the statutory context in which they appear," the Commission was given "a veritable code of rules . . . to follow").

2. The Nondelegation Doctrine Is Applied Indirectly Through The "Clear Statement" Requirement

Another, more nuanced application of the indirect nondelegation doctrine is the "clear statement" rule which provides that enabling acts should be construed narrowly so as to avoid substantial constitutional issues absent an express congressional mandate requiring the challenged rule or practice. The clear statement rule, like the nondelegation doctrine, is based on the principle that Congress, not just the agency, must expressly consider and speak clearly to the constitutional issue. The primary cases, in addition to the case under review herein, adopting this form of the indirect nondelegation rule, are:

- *Kent v. Dulles*, 357 U.S. 116 (1958): interpreting Secretary of State's passport authority narrowly to deny him the power to refuse a passport on grounds of political belief. The Court noted that it would "not readily infer that Congress gave the Secretary of State unbridled discretion . . . ." *Id.* at 129. Citing *Youngstown Sheet & Tube* and *Panama Refining*, the Court ruled that delegated powers trenching on liberty interests—here the "right of exit"—"must be pursuant to the lawmaking functions of the Congress" and "must be adequate to pass scrutiny by the accepted tests." *Id.* Thus, it "construe[d] narrowly all delegated powers that curtail or dilute them." *Id.* However, where the administrative policy was "'sufficiently substantial and consistent' to compel the conclusion that Congress has

[implicitly] approved it," *Haig v. Agee*, 453 U.S. 280, 306 (1981) (citing *Zemel v. Rusk, supra*), the delegation is reviewed in light of those restrictions.

- *Greene v. McElroy*, 360 U.S. 474 (1959): refusing to find an implicit congressional delegation of authority to the Department of Defense to administer a constitutionally questionable security clearance program. The Court reasoned that "[w]ithout explicit action by lawmakers, decisions of great constitutional import and effect" should not be "relegated . . . to administrators who, under our system of government, are not endowed with authority to decide" large constitutional questions. *Id.* at 507.
- *Rust v. Sullivan*, 500 U.S. 173, 191 (1991): holding that abortion counseling regulations did "not raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume that Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality." (citations omitted)

This summary of decisions considering the indirect ("weak form") of the nondelegation doctrine shows that this Court has not hesitated to apply it to rein in administrative discretion where the agency has asserted that its authority gives it unbounded power to regulate. As shown further below, we believe that EPA's reading of § 109 of the CAA is just such an erroneous interpretation. It therefore should be curtailed as the court of appeals demonstrated.

B. As Interpreted By EPA, Section 109 Of The Clean Air Act Would Allow EPA To Set NAAQS Without Reference To Any "Determinate Criterion"

EPA advocates a simplistic view that the nondelegation doctrine is limited to the "strong form" cases which, they point out, have not been applied to invalidate any delegation since 1936. But its brief fails to consider, much less apply, those cases

which read enabling statutes narrowly or require a "clear statement" in order to avoid a direct confrontation with the nondelegation rule. Thus, EPA's argument fails to consider this Court's jurisprudence indirectly applying the nondelegation doctrine as set forth in *Zemel, National Cable, Benzene, Iowa Utilities, MCI, Amalgamated Meat Cutters,* and *Kent.*[9] Further, its *ipse dixit* that CAA § 109 "plainly satisfies the nondelegation doctrine," Pet. Br. at 26 n.20, is no substitute for analysis. Nor are other provisions of the CAA, Congress' frequent amendment of the Act, or the applicability of internal APA-type procedures and external judicial review, *id.* at 22-26, an adequate alternative. These provisions do not give EPA guidance on the applicable criteria for setting the appropriate NAAQS levels.

Nowhere in its 50-page "analysis" does EPA demonstrate how any of the "directives" in § 109 of the CAA constrict EPA's discretion in setting ozone or particulate matter levels—i.e., ozone at .08 ppm rather than .07 or .09. For example, EPA asserts that the "intelligible principle" standard is satisfied (in part) by the statutory requirement in § 109(b)(1)(A)-(B) that "a pollutant must 'reasonably be anticipated to endanger public health or welfare' and be emitted from 'numerous or diverse * * * sources'" in order to be regulated. Pet. Br. at 23. While EPA correctly quotes the statutory words, it does not show how that language confines EPA's discretion on setting the level for nonthreshold pollutants. Because both ozone and particulate matter can cause adverse health effects *at any level above zero*,

---

[9] EPA attempts to rely on *Touby* (discussed p. 8 *supra*) as supporting its argument that the CAA puts "'multiple specific restrictions'" on EPA's discretion. Pet. Br. at 25 & n.19. But that argument was upheld in *Touby* only after the Government greatly narrowed its interpretation of the reach of the Controlled Substances Act and conceded that further testing was required before drugs could be added to the list of controlled substances by the Attorney General and that a defendant charged with a violation could always challenge the classification despite the Act's very restricted review provisions. See *Touby*, 500 U.S. at 169-70 (Marshall, J., concurring).

see Mercatus Center Amicus Br. (99-1426) at 6, § 109 identifies only categories of pollutants that can be regulated, not the range or basis for selecting any specific NAAQS level.

In addition, the procedural and judicial review devices set forth in the CAA do not provide further guidance. If such "procedural and review restrictions" were sufficient, a statute that authorizes EPA to "go forth and do good" without regard to implementation costs would be sufficient to satisfy the nondelegation doctrine. See *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1284 (5th Cir. 1983) (rejecting expansive interpretation of the National Transportation Policy, "which paraphrased says little more than 'go forth and do good,' as a congressional grant of rulemaking authority might well amount to an unconstitutional delegation of legislative authority").

EPA's argument fails to identify any "determinate criterion" elsewhere in the statute, legislative history or other rules which EPA must weigh in setting NAAQS levels. Costs are ruled out because of *Lead Industries*. EPA has not identified health-health, wealth-health or any other decision framework from which such guidance could be obtained. See Mercatus Center Amicus Br. (99-1426). Therefore, the CAA must be reinterpreted consistent with the nondelegation doctrine if the ambient air program is to be extended to new ozone levels or particulate matter.

C. Remanding The Matter To EPA To Identify The Criteria For Determining The Level Of Nonthreshold Pollutants Is Required By *Chevron*

There is one element in the lower court's application of the nondelegation doctrine that could be said to be "novel" or "unprecedented." Its ruling that EPA rather than the reviewing court should, in the first instance, determine the meaning embedded in § 109 regarding the criterion(ia) that governs the establishment of NAAQS levels is distinctive. Pet. Cert. App. at 4a (court ordered "remand [of] the cases for EPA to develop a

construction of the act that satisfies this constitutional [i.e., nondelegation] requirement"). In all prior cases applying the indirect nondelegation doctrine, see pp. 7-11 *supra*, the court rather than the agency determined the meaning of the statute.[10] On the other hand, the new direction provided by the lower court here, of remanding the issue to the agency, is simply an adaptation of the indirect nondelegation doctrine to current standards of judicial review.

Under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984), reviewing courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant that EPA's regulation of "stationary sources" of pollution allowed it the choice between measuring emissions solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify the determinate criteria consistent with Congress' intent.

The identification of the numerical equivalent or level necessary to "protect public health" with an "adequate margin of safety" (per CAA § 109) for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue NAAQS as legislative rules. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. See also *Hoctor v.*

---

[10] *Iowa Utilities* might be said to be an exception because there the Court found that the 1996 Telecommunications Act was ambiguous and thus under *Chevron* step two was to be interpreted by the FCC. Even then, however, the Court substituted its reading for the agency's because the agency's reading was not "reasonable." 525 U.S. at 392. Further, the Court not only held that the FCC had failed to identify any restrictive standard, but also that private parties, rather than the FCC, were to decide the critical policy issues. On the other hand, the Court vacated the FCC rule because it was based on an erroneous interpretation, *id.* at 391-92, and to allow it to identify the limiting standard in a manner consistent with the Court's reading of the Act.

USDA, 82 F.2d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements involve legislative judgments which agencies are better positioned to make). Under the lower court's ruling, EPA's interpretation will be upheld (if reasonable) if it provides a standard which it applied when determining the particular NAAQS levels.

Enforcement of the nondelegation doctrine, to require that NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with the policy bases of *Chevron*. Not only is EPA a quasi-legislative body held accountable by the President's authority over it, but also EPA is the body best positioned to determine the range of policy choices Congress intended when it drafted § 109. 467 U.S. at 865-66. Nor should there be any concern that under these circumstances the agency's interpretation is "carved in stone." To the contrary, it can be modified as necessary to meet changing circumstances. All that the court of appeals did was eliminate one of those choices, namely, EPA's interpretation that it could select particular NAAQS levels simply based on its "policy judgment" without regard to any determinate criterion. But once it identifies the criteria it will apply in selecting the NAAQS levels, those criteria can still be modified as long as the changed interpretation is plausible and is justified by cogent reasons. See *Rust v. Sullivan*, 500 U.S. at 186-87.

II. REVIEW OF LEGISLATIVE RULES UNDER THE ADMINISTRATIVE PROCEDURE ACT IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Review under the Administrative Procedure Act's "arbitrary and capricious" test, 5 U.S.C. § 706(2)(A), is not a substitute, as Judge Silberman contends, for application of the nondelegation doctrine to control standardless discretion. Pet. Cert. App. at 95a-96a. The nondelegation doctrine, as applied by the court

of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent restricts administrative discretion to understandable bounds, it will not be disturbed by the nondelegation doctrine. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109— it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence, and the inferences drawn from them, as well as the policy rationale and ultimate conclusions, must be adequately connected, explained and justified. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, arbitrary and capricious review does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decisionmaking. Defining the authority and discretion granted by Congress is not the same thing as deciding whether agency policy choices are adequately supported by the record and reasons. The two requirements complement each other; one is not a substitute for the other.

III. EPA DID NOT RECOGNIZE ANY LIMITATIONS ON ITS DISCRETION TO SET NAAQS FOR OZONE AND PARTICULATE MATTER

EPA argues, in the alternative, that its choices were "channel[ed]" and "narrow[er] than the [lower] court acknowledged." Pet. Br. at 31-34. It contends that its discretion was limited both by "upper" and "lower" bounds, *id.* at 31, by "the latest

scientific knowledge on the health effects" of PM and ozone, and by the requirements of reasoned decision making (i.e., "that the agency consider relevant factors, apply them to relevant facts, respond to criticisms and adequately explain its rationale"). *Id.* at 32.

But process, while important, is no substitute for substantive standards. Indeed, without some standard, judicial review is unlikely to be effective in controlling arbitrary action. *Amalgamated Meat Cutters*, 337 F. Supp. at 759. Thus, EPA's process-based argument is meaningless. It would uphold virtually any regulatory scheme subject to the procedural requirements and traditional "arbitrary and capricious" test under the Administrative Procedure Act, regardless of the absence of any limits on the agency's substantive authority. Because virtually all agencies are now governed by similar APA requirements, see *Dickinson v. Zurko*, 527 U.S. 150 (1999), this assertion, if accepted, would nullify the nondelegation doctrine. To be sure, procedural and judicial requirements are important constraints on agency discretion if the substantive provisions, express or otherwise, include intelligible principles or standards by which the agency action is measured. See *Yakus v. United States*, 321 U.S. 414, 437 (1944). However, neither procedural nor judicial review requirements limit policy choices where no substantive criteria are identified. EPA's rulemaking record included mountains of "scientific evidence," but EPA cannot identify anything in the record that supports one NAAQS level over another.[11] We thus turn to the first two contentions.

---

[11] In addition, EPA's brief often claims evidentiary support where none is there. For example, its reference to a CASAC review as supporting an upper bound of .08 ppm on ozone (Pet. Br. 33, cross referencing *id.* at 13-14) is in error. That review occurred in 1993 unrelated to the rulemaking at issue here; it does not refer to the CASAC review relied upon as support for the challenged rule; and it concluded that the ozone standard should not be tightened. Thus, it is disingenuous at best for EPA to rely upon this study as a basis for a tighter standard.

Contrary to EPA's contentions, its rulemaking statement never identified either an upper or lower bound for the standards. (Indeed, the preambles to the final ozone and PM rules never use such terms.) For example, the citation to PM App. 2145 & 2147 (Pet. Br. at 31) refers only to the "staff's judgment" on consideration of "an annual $PM_{2.5}$ standard set below a level reflecting approximate equivalence with the current annual NAAQS," and to their "belie[f]" that a level of 12.5 μpgm^3 is appropriate because it is "the lowest cutpoint for a possible threshold." Neither staff opinion was adopted by the Administrator and neither was said to be a limitation on her discretion.

Nor is there any support in the rulemaking record that EPA was confined by the "latest scientific knowledge" on its selection of the PM and ozone levels. EPA's statement in the final PM rule nowhere defines a range for the standard. The cited pages (Pet. Br. at 32 referencing 62 Fed. Reg. at 38,675-77) mention only the ranges observed in different studies and concludes without explanation that the level selected (of 15 μpgm^3) is appropriate. EPA's referenced scientific support for the ozone rule (Pet. Br. at 32 cross referencing p. 13 citing 62 Fed. Reg. at 38,863-64) is similarly untrustworthy. EPA cites a 1993 CASAC review of the prior standard to suggest that the existing .12 ppm one-hour standard is an upper bound. However, even this limitation provides no guidance as to the level at which the NAAQS should be set. In any event, this conclusion was not endorsed by CASAC in its review of the current standard. There it said only that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." CASAC Letter to Carol Browner re: Ozone (November 1995) in Ozone JA 238.

No matter how EPA now seeks to dress-up its rulemaking analysis and assert that its discretion is "narrowly" confined, Pet. Br. at 31; see *id.* at 25, in fact it relied solely on the bald claim that determining the "adequate margin of safety" was a

"policy judgment left specifically [by CAA § 109] to the Administrator's judgment." 62 Fed. Reg. at 38,857; 62 Fed. Reg. at 38,653.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals and remand the matter to EPA for it to interpret § 109 of the CAA in light of the requirements of the nondelegation doctrine.

Respectfully submitted,

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

September 11, 2000

29

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

IN THE

Supreme Court of the United States

CAROL M. BROWNER,
Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS AND CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

BEST AVAILABLE COPY

33pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONGRESS MAY NOT DELEGATE POLITICAL CHOICES BETWEEN COMPETING AND IRREDUCIBLE VALUES. 3

A. The Nature of Legislative Action. 5

B. The Requirements of Adequate Legislative Guidance to Executive Agents. 9

II. SECTION 7409 VIOLATES THE NONDELEGATION DOCTRINE BY NOT GUIDING THE VALUE CHOICES FACED BY EPA. 15

A. The Unguided Value Choice Delegated to EPA. 15

B. Mere Consideration of Costs and Benefits Offers No Intelligible Principle. 25

C. Invalidation Is The Appropriate Remedy For Improper Delegation. 27

CONCLUSION 28

TABLE OF AUTHORITIES

Pages

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935).....3, 11

Alden v. *Maine*, 527 U.S. 706 (1999).....4

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946).....10, 11

American Trucking Ass'ns, Inc. v. *EPA*, 175 F.3d 1027 (CADC 1999) ("*ATA I*").....passim

American Trucking Ass'ns, Inc. v. *EPA*, 195 F.3d 4 (CADC 1999) ("*ATA II*").....6, 21, 28

City of Boerne v. *Flores*, 521 U.S. 507 (1997).....4

Environmental Defense Fund v. *EPA*, 598 F.2d 62 (CADC 1978).....25

Field v. *Clark*, 143 U.S. 649 (1892).....3, 6, 11, 15

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*").....5, 6, 28

INS v. *Chadha*, 462 U.S. 919 (1983).....13

J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928).....3

Lead Industries Ass'n v. *EPA*, 647 F.2d 1130 (CADC), *cert. denied*, 449 U.S. 1042 (1980).....23, 24

Loving v. *United States*, 517 U.S. 748 (1996).....passim

Mistretta v. *United States*, 488 U.S. 361 (1989).....passim

Opp Cotton Mills, Inc. v. *Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126 (1941).....11

Pegram v. *Herdrich*, -- U.S. --, 120 S. Ct. 2143 (2000).....27

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996).....4

Touby v. *United States*, 500 U.S. 160 (1991).....14

United States v. *Lopez*, 514 U.S. 549 (1995).....4, 7, 8

United States v. *Morrison*, -- U.S. --, 120 S. Ct. 1740 (2000).....4

Yakus v. *United States*, 321 U.S. 414 (1944).....6, 9, 15, 21

Statutes

42 U.S.C. § 7408.....19, 26

42 U.S.C. § 7409.....passim

42 U.S.C. § 7412.....18, 19

Regulations

62 Fed. Reg. 38,656 (1997).....16, 23

62 Fed. Reg. 38,688 (1997).....22

Constitutional Provisions

U.S. Const. art. I, § 1.....3

Other Authorities

123 Cong. Rec. S9423 (daily ed. June 10, 1977).....24

123 Cong. Rec. S9426 (daily ed. June 10, 1977).....24

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977).....24

IN THE

Supreme Court of the United States

CAROL M. BROWNER,
Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

INTEREST OF AMICI CURIAE[1]

The Association of American Physicians & Surgeons ("AAPS") is a nonprofit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and free markets. Central to the interests of AAPS are the enforcement of constitutional limits on the exercise of government power in general and on the administrative state in particular.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

Sweeping delegations of authority in the areas of health and medicine are extremely prone to abuse and difficult to police. AAPS has extensive experience challenging the regulatory edicts of an unresponsive federal health bureaucracy and knows first-hand the nature of administrative abuse that comes from lack of adequate legislative direction and control. AAPS thus views a revitalized nondelegation doctrine as essential to a limited government respectful of free markets and free citizens.

The Center for Individual Freedom ("CIF") is a nonprofit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights. It believes that the greatness of our Constitution lies not only in its protection of individual freedom through specific individual rights forbidding certain uses of power, but also in its structural protection of freedom through the many constraints it places on *any* exercise of power. CIF thinks the nondelegation doctrine should be applied with vigor and courage. Rather than fear any resulting inefficiency from demanding that Congress itself exert more guidance on the rules governing society, we should applaud such inefficiency as a bulwark preserving individual freedom.

SUMMARY OF ARGUMENT

This brief will address the first question presented by Petitioners: Whether 42 U.S.C. § 7409, the Clean Air Act provision directing EPA to set and revise national ambient air quality standards ("NAAQS"), is an unconstitutional delegation of legislative power. It is the duty of Congress to make the value choices that are inherent in legislative decision making. While Congress may delegate the execution of those choices to various agents, it may not delegate the value choices themselves. In this case Congress has done precisely that which is forbidden. Although Congress has provided a variety of relevant considerations to be consulted in setting NAAQS, it has not provided any guidance as to how those

considerations are to be weighed against each other. Regardless whether § 7409 limits EPA to consideration of only direct health effects from pollutants or also allows consideration of the human and economic costs of pollution control, that provision constitutes an unlawful delegation insofar as it permits EPA to set nonzero NAAQS for nonthreshold pollutants but provides no intelligible principle directing EPA where to set such NAAQS.

ARGUMENT

I. CONGRESS MAY NOT DELEGATE POLITICAL CHOICES BETWEEN COMPETING AND IRREDUCIBLE VALUES.

The Constitution commands that "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Derived from this fundamental command, the basic statement of the nondelegation doctrine has been established for over a century:

> [W]e long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch.

Mistretta v. *United States*, 488 U.S. 361, 371-72 (1989) (quoting *Field* v. *Clark*, 143 U.S. 649, 692 (1892)). While recognizing that Congress may seek "assistance from another branch," the nondelegation doctrine requires Congress to "lay down by legislative act an intelligible principle to which [its agent] is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406, 409 (1928).

This Court has been unfailing in confirming the existence of the nondelegation doctrine and its requirement that Congress provide an intelligible principle to guide the actions of its agents. *See, e.g., A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-30 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legisla-

tive functions," which consist of "laying down policies" and "establish[ing] the standards of legal obligation"); *Loving* v. *United States*, 517 U.S. 748, 758, 771 (1996) ("fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity"; "intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws").

Yet while this fundamental constitutional doctrine is oft-stated, it is rarely enforced. As this Court noted in *Loving* v. *United States*, "[t]hough in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms." 517 U.S. at 771 (citations omitted). Unfortunately, the history of the nondelegation doctrine can seem a history filled with excuses for not applying it.

Amici respectfully suggest that if the Constitution indeed contains a nondelegation doctrine – and we believe it does – then this Court is obliged to give identifiable content to that doctrine. Declaring a constitutional principle that in practice is never enforced only reduces respect for the Constitution and encourages disregard of all constitutional boundaries. Such disregard had become apparent concerning Congress's enumerated power under the Commerce Clause, and this Court is just recently beginning to re-establish coherent constitutional limits on that power. *See United States* v. *Morrison*, -- U.S. --, 120 S. Ct. 1740 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995).[2] The Constitution's careful allocation of powers and its constraints on the means of their exercise are likewise deserving of renewed attention as they play a vi-

[2] In other areas as well, this Court has rediscovered the constitutional limits on government action. *See Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) (Eleventh Amendment immunity); *Alden* v. *Maine*, 527 U.S. 706 (1999) (state sovereign immunity); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (limits on power under § 5 of the Fourteenth Amendment).

tal role in ensuring the limited government envisioned by the Founders and in constraining the too-easy exercise of authority at the expense of liberty.

Several members of this Court have already shown some reluctance to continue merely reciting and then ignoring the nondelegation doctrine. Thus, in a delegation case involving crimes by members of the military, Justice Thomas relied only upon the President's unique authority as Commander in Chief and significantly took "no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context." *Loving*, 517 U.S. at 778 (Thomas, J., concurring in the judgment). And in a case involving regulation of health and safety in the workplace, then-Justice Rehnquist went further, writing that "[i]f we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it." *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) ("*Benzene*") (Rehnquist, J., concurring in the judgment). Such questioning of this Court's reticence is well-taken, especially because "ensuring" that Congress make those decisions assigned to it by the Constitution, though perhaps a "burden," is also a duty assigned to this Court by that same Constitution.

This case presents an opportunity for all members of the Court to revisit whether its nondelegation jurisprudence has drifted too far from first principles and hence distorted the constitutional scheme. It is time to return to those first principles and give content to the neglected but vital constitutional requirement that only Congress may make the laws.

A. The Nature of Legislative Action.

In order to give content to the nondelegation doctrine, it is first necessary to define that which may not be delegated – the legislative power. "The essentials of the legislative function are the determination of the legislative policy and its

formulation and promulgation as a defined and binding rule of conduct." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). Then-Justice Rehnquist in the *Benzene* case aptly characterized "the very essence of legislative authority under our system" as the making of "the hard choices, and not the filling in of the blanks." 448 U.S. at 687 (Rehnquist, J., concurring in the judgment); *see also Field* v. *Clark*, 143 U.S. at 693 (legislative power is concerned with the "expediency or the just operation" of particular commands, whereas the execution of the law turns on ascertaining "the existence of a particular fact" upon which a legislative command may be contingent); *American Trucking Ass'ns, Inc.* v. *EPA*, 195 F.3d 4, 15 (CADC 1999) ("*ATA II*") (Silberman, J., dissenting from denial of rehearing *en banc*) ("[The purpose of the nondelegation doctrine] is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. The ability to make those policy choices (even if only at a broad level of generality) is what is meant by legislative power.").[3] The hard and crucial policy choices required to be made by Congress typically have one thing in common: they each involve a clash of competing values and interests that cannot be reconciled by merely mechanical methods, but must be decided by unvarnished political considerations.

This conception of legislative power fits within the broader separation-of-powers principle integral to the structure and function of our constitutional democracy. As Justice Kennedy, writing for the Court, observed:

> By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National

[3] *Cf. Mistretta* v. *United States*, 488 U.S. 361, 419-20 (1989) (Scalia, J., dissenting) ("As John Locke put it almost 300 years ago, '[t]he power of the legislative … being only [the power] to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.' J. Locke, Second Treatise of Government 87 (R. Cox ed.1982) (emphasis added).")

> Government that is both effective and accountable. Article I's precise rules … make Congress the branch most capable of responsive and deliberative lawmaking. … The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.

Loving, 517 U.S. at 757-58. Furthermore, what Justice Kennedy previously has said concerning the roles of the States and the federal government under Our Federalism is readily and appropriately transposed to the requirement of nondelegation between branches of the federal government:

> The theory that two [branches] accord more liberty than one requires for its realization two distinct and discernable lines of political accountability …. [C]itizens must have some means of knowing which of the two [branches] to hold accountable for the failure to perform a given function. '[Separation of powers] serves to assign political responsibility, not to obscure it.' … Were the [Executive] to take over the regulation of entire areas of traditional [congressional] concern, … the boundaries between the spheres of [legislative and executive] authority would blur and political responsibility would become illusory. … The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to [a single branch].

Lopez, 514 U.S. at 576-77 (alteration added, citations omitted). Like federalism, the nondelegation doctrine ensures proper accountability for difficult and perhaps divisive choices by demanding that Congress make those choices and make them in a way that is transparent to the agents who must execute them, to the courts that must review them, and to the citizens who must finally judge them.

Despite agreement about the existence and importance of the delegation doctrine, the difficulty over the years has been in applying the doctrine. That difficulty was summed up by Justice Scalia, who offered that once it is conceded that "some judgments involving policy considerations" must be left open by Congress, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Mistretta*, 488 U.S. at 415-16 (Scalia, J. dissenting). As with questions of federalism, once nondelegation questions are defined as merely ones "of degree," it becomes tempting for courts to leave nondelegation concerns to the political process and to entrust the political branches with abiding their own duty to preserve the constitutional balance. But "the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Like federalism, the nondelegation doctrine "is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* And indeed, even Justice Scalia recognizes that "[a]t some point the responsibilities assigned [by Congress to the Executive] can become so extensive and so unconstrained that Congress has in effect delegated its legislative power." *Loving*, 517 U.S. at 777 (Scalia, J., concurring in part and concurring in the judgment). The task, therefore, is to generate a workable formulation for finding where that point might be.

Amici believe that such formulation must start with a more stringent version of the intelligible-principle requirement that focuses on the necessarily political choices required in balancing competing and irreconcilable values. While no formulation can eliminate questions of degree at the margins, focusing on congressional value choices can certainly expand

the role of constitutional principle and help "prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 758.

B. The Requirements of Adequate Legislative Guidance to Executive Agents.

An endlessly generous conception of the requirement for "intelligible" principles in legislation renders unenforceable the principle that in almost all instances "the basic policy decisions governing society are to be made by" Congress. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Id.* at 416. If the nondelegation doctrine is to have meaning, therefore, the requirement of an intelligible principle must itself be given intelligible content.

Amici propose that for any legislative guidance regarding further prospective rulemaking to qualify as an intelligible principle it must, in addition to the current requirements for channeling the *scope* of rulemaking authority, identify those policy values that provide both the bases of and the limits on such rulemaking and *articulate a reviewable means for resolving conflicts between and calibrating the balance among competing values.* It is only through this added element that executive agents can know Congress's legislative will and that courts will be able to distinguish between the execution of congressional policy and the administrative exercise of abdicated legislative authority.

Substantive Guidance Sufficient for Accountability. An essential means of determining whether legislation provides an adequately intelligible principle for guiding subsequent behavior is to ask if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. For it is only when the "legislative policies and standards [are] clear" that "judicial review of the remedies adopted by the [agency can] safe-

guard[] against statutory or constitutional excesses." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 106 (1946). In many cases, however, courts have lacked such clear guidance and thus often concluded that an agency's policy choices were unreviewable exercises of administrative discretion.

Requiring Congress to identify the values both advancing and restraining administrative action, and to address conflicts and balancing among those values, both comports with the essence of law making and lessens a central tension of administrative law: the need to judge administrative determinations but the inability to substitute judicial opinions for administrative discretion on matters of policy. When Congress then chooses to enlist agencies to execute its will, the required policy-making hierarchy will give direction to those agencies on how to make subsidiary policy decisions and will provide a legislative standard by which courts can judge those policy decisions. Executive agents thus can be made accountable not just for the process by which they make decisions, but for the substance of those decisions as well.

In addition, requiring that the fundamental value balance be part of the legislation itself (rather than hidden in the administrative process) ensures the political accountability for Congress that is a central purpose of the nondelegation doctrine. It will no longer be sufficient to articulate and take credit for only the popular half of legislative policy – such falsely singular purposes as to protect health, to feed the hungry, and to serve the public interest. Instead, Congress also will have to identify and take responsibility for the competing policies that necessarily limit such self-serving declarations of purpose. Legislation necessarily involves hard choices among competing values and interests, and forcing those choices into the law, rather than allowing them to be buried in the administrative process, ultimately "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving*, 517 U.S. at 758.

Complex Facts Do Not Excuse Hard Value Choices. A reluctance to enforce the nondelegation doctrine has sometimes been attributed to the notion that in "an increasingly complex society Congress obviously could not perform its functions" without assistance from the other branches. *Opp Cotton Mills, Inc.* v. *Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126, 145 (1941). Even assuming such congressional inability were true, it nonetheless begs the question of what type of help is required or permitted. In *Amici*'s view, Congress may obtain help in analyzing complex facts, in identifying difficult policy choices and competing social values, and in studying the consequences of various legislative responses. What Congress must do for itself, however, is make the final determinations of which policies to pursue, which values will take precedence, and how far any given trade-off will go.

Although past cases are hardly uniform on the point, the concern over Congress's ability to handle complexity and detail has often – and more appropriately – been addressed to the facts and circumstances to which legislation will apply, not to the basic task of establishing relevant value hierarchies and resolving value conflicts. Thus, in *Schechter Poultry*, this Court recognized "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly." 295 U.S. at 529-530. In *Opp Cotton Mills*, this Court was concerned that Congress not be "obliged to find all the facts subsidiary to" its legislative policy decisions. 312 U.S. at 145. And in *American Power & Light*, "the necessities of modern legislation dealing with complex economic and social problems" were said to make it inefficient to require Congress "to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." 329 U.S. at 105; *see also Field* v. *Clark*, 143 U.S. at 694 (legislature "can make a law to delegate a power to determine some fact or state of things upon which the law

makes ... its own action depend") (citation and quotation marks omitted). Thus, whatever "necessities" may arise from the complexities of modern problems, it should be sufficient for Congress to receive assistance regarding the facts and circumstances of those problems, without the need for others to also make the policy choices that will be overlaid upon those varying facts and circumstances.[4]

Any fear that requiring Congress to make even its own value choices "would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government," *Loving*, 517 U.S. at 758, is unwarranted. While there certainly are many issues vying for the attention of Congress, one might wonder whether Congress's already prodigious grasp now exceeds the scope of its constitutionally proper reach, thus creating the supposed scarcity in its available attention. As Congress's grasp is once again confined to matter genuinely involving interstate commerce, for example, it may find more time to "divert" to attending its constitutional duties when formulating legislation. Furthermore, insofar as Congress's limited capacity to make complex and difficult decisions limits the number of issues it can address or the number of laws it can pass, such limits are entirely consistent with the constitutional scheme. It may be less efficient to constrain Congress's capacity so, but such inefficiency is

[4] And if it were still deemed too burdensome for Congress to make the requisite value decisions at the outset, it could presumably seek further assistance by requesting of its agents *proposed* legislation resolving the value questions, which Congress would then approve, modify, or reject. While easing Congress's initial legislative load, such an approach would still preserve the constitutionally required checks on the adoption of a new law and would keep with Congress the affirmative responsibility for the value choices in such a new law. The D.C. Circuit below seemed to recognize this alternate course when it observed that "if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1040 (CADC 1999) ("*ATA I*").

precisely the type of structural check that the Framers used to limit the exercise of national power. This type of limit also forces Congress to prioritize its legislative goals in light of its limited institutional resources, thus ensuring that such laws as it does pass are those most appropriate for national, rather than state or local, attention. Finally, even if it were today thought desirable to supplement congressional capacity to address multiple and complicated issues, "there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

Post-Hoc Legislative Review Is Insufficient. The occasional suggestion that Congress's *post hoc* oversight of its agents is sufficient to overcome nondelegation problems, *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1061 (CADC 1999) ("*ATA I*") (Tatel, J., dissenting), inverts the constitutional limits on the legislative power. *Cf. INS* v. *Chadha*, 462 U.S. 919, 954-955 (1983) (Congress may not enact laws without bicameral passage and presentment of the bill to the President). Before imposing obligations on the citizenry, Congress must overcome inertia and objection and a possible veto by the President. To require instead only that Congress act as a *post hoc* reviewer of the legislative acts of its agents would transform those safeguards *against* too-facile exercise of authority into a protection *for* the unguided exercise of authority by administrative agents.

Impact on Precedent. A more stringent version of the intelligibile-principle requirement might well have changed the results of some past cases, and certainly would have required further analysis in many others. But it seems quite possible that many past results would have been the same even under such further analysis.

For example, *Mistretta* involved the special context of sentencing, in which the statute did "no more than fetter the

discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." 488 U.S. at 396. In addition to such context, this Court also held that Congress "in actuality ... legislated a full hierarchy of punishment ... and stipulated the most important offense and offender characteristics to place defendants within these categories." *Id.* at 377. Congress also had set statutory ranges of punishment for all crimes, further limited the deviation between minimum and maximum sentences under the eventual sentencing guidelines, and identified current average sentences as a benchmark. *Id.* at 375. And while the statute in *Touby* v. *United States* contained the seemingly broad authority to regulate new drugs that pose an "imminent hazard to public safety," it also contained quite detailed guidance as to what might constitute such a hazard. 500 U.S. 160, 165-166 (1991) (discussing multi-layered elements of the imminent-hazard determination). The statute further required separate findings that a targeted drug "'has a high potential for abuse,' that it 'has no currently accepted medical use in treatment in the United States,' and that '[t]here is a lack of accepted safety for use of the drug ... under medical supervision.'" *Id.* at 167.

Several decisions also have distinguishing elements relating to the special nature of the power at issue or the special authority of the agent. Thus, in the military-justice case of *Loving* v. *United States*, the delegated duty was "interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" 517 U.S. at 772 (citation omitted). In *Field* v. *Clark*, not only was the subject matter that of foreign relations and trade, but the alleged delegation involved a mere finding by the President of "the existence of a particular fact" and "[n]othing involving the expediency or the just operation of such legislation was left to the determination of the president." 143 U.S. at 693. And in *Yakus*, the exigencies of war may have caused this Court to be more lenient than otherwise, and even then there was at least some arguable guidance, with price-stabilization benchmarks starting at "the prices prevailing between October 1 and October 15, 1941," and later revised "on the basis of the levels which existed on September 15, 1942." 321 U.S. at 421, 423.

The point of these examples is not to pre-determine any other specific cases, but rather to show that while a reinvigorated nondelegation doctrine may well conflict with (and hence overrule) much loose language and a number of results from prior cases, it need not require repudiation of *all* results reached under more lenient past applications of that doctrine.

II. SECTION 7409 VIOLATES THE NONDELEGATION DOCTRINE BY NOT GUIDING THE VALUE CHOICES FACED BY EPA.

Applying the above principles to § 7409, Congress has passed off to EPA numerous unguided value choices inherent in setting NAAQS and consequently has violated the nondelegation doctrine. What § 7409 does is merely tout one half of the values at stake – health, safety, and welfare – without offering any intelligible principle on how much is enough. Whether viewed strictly in EPA's direct-health terms or more sensibly viewed to include the full range of monetary and human costs and benefits associated with pollution control, EPA's task under § 7409 requires the agency to make the type of fundamental value choices that Congress may not delegate.

A. The Unguided Value Choice Delegated to EPA.

The initial requirements for setting and revising NAAQS are that they must be set at levels "requisite to protect the public health" and must provide an "adequate margin of safety." § 7409(b)(1). If understood as imposing a legislative requirement of zero-harm and zero-risk, this language might provide fairly discrete, though absurd and potentially uncon-

stitutional, guidance for EPA. Thus, if one were to accept EPA's speculative and occasionally irrational linear no-threshold hypothesis regarding harm from certain pollutants, these requirements would seem to require NAAQS levels set at zero concentration.[5]

Nobody interprets § 7409 in this way, however, and therein lies the problem. Thus, while EPA views its task as being to "reduce risks sufficiently to protect public health with an adequate margin of safety," it "recogniz[es] that [PM] standards will not be risk-free." 62 Fed. Reg. at 38,656 (1997). But if it is accepted that EPA can set NAAQS that allow *some* harm to health and welfare, then the statute provides no principle – intelligible or otherwise – as to how much harm is permissible or required. "For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent non-delegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much." *ATA I*, 175 F.3d at 1034. In fact, § 7409 fails explicitly even to identify competing values that might justify accepting some risk of harm from pollutants, much less to prioritize or to calibrate such values against the otherwise blindly monolithic policy of protecting health and welfare against the risks of pollutants. EPA's supposed recognition that "its mandate is not to set standards more stringent than requisite to protect against health effects of public health significance," Pet. Br. 33, offers no intelligible guidance because it merely adds a second fully indeterminate standard atop the

[5] The linear no-threshold hypothesis that EPA often applies is, in many cases, demonstrably false. Vitamins and such EPA-regulated pollutants as trace minerals and radiation are unhealthful or lethal in high doses, but are essential to life in small doses. Yet EPA hypothesizes low-dose harm by extrapolating from high doses and then ignores all other consequences of its action. This approach uses tiny doses of "pollutants," which can be measured, as a surrogate for health, which cannot be measured directly.

first. Given EPA's mandate to prevent unknown harms, it is difficult to imagine *any* health effect that could not be used to justify EPA regulation.

Without intelligible principles with which to determine how much protection is enough, EPA's decisions take on airs of the absurd. The typical external constraints on such facially unlimited goals as health and safety are unavailable, hence any nonzero stopping point for NAAQS becomes either arbitrary or disingenuous. For example, the decision to permit ozone levels that cause only temporary and reversible harm to human health makes no sense in EPA's direct-health-only paradigm. Why *wouldn't* EPA prevent such harms. Surely even temporary pain and suffering have some negative value in any honest calculus of public health. In the real world, such harms might be tolerated because eliminating them would be infeasible, overly expensive, or would have other collateral consequences deemed to outweigh the potential benefits. But in EPA's surreal direct-health-only world, NAAQS must be assumed to be entirely without costs or other indirect consequences. Given such an assumption, any decision to ignore even limited harms thus is either arbitrary or is made without disclosing the actual values driving EPA's choices.[6]

[6] For nonthreshold pollutants, the only check on setting all NAAQS at zero is the possibility that a pollutant has some positive direct health effect which may outweigh its negative effects at some optimum concentration. Such countervailing direct health effects would, effectively, turn the pollutant into a *net* threshold pollutant, at which point EPA would be required to set the NAAQS at some indeterminate point below the threshold. EPA opposed even this minimal internal check on its health-related value choices, arguing that it was not obliged to look at beneficial health effects from pollutants. *ATA I*, 175 F.3d at 1051. This is bitterly ironic given that the beneficial effects of various trace pollutants might actually be easier to demonstrate than the speculative harm from low doses, and EPA's overexuberance might well be costing lives rather than saving them.

Claims of Complexity Only Mask Value Choices. In defense of EPA's unguided policy discretion, Petitioners claim that the agency must make "highly technical judgments about the health and welfare effects of particular pollutants." Pet. Br. 25. That claim ultimately misses the point. The technical judgments are just the first steps to the NAAQS – identifying various effects that may or may not justify regulation. Whether such effects are determined once, or periodically revisited "based on the 'latest scientific knowledge,'" Pet. Br. 28, does not change the fundamental nondelegation problem. For it is not the fact-finding steps, but rather the unguided final step – deciding whether it is worth it or desirable to regulate the effects so found – that violates the nondelegation doctrine. The final step is not a "technical" judgment, it is a *value* judgment that happens to have technical information as one of its considerations.

Likewise, the claim that further congressional guidance is not possible given the complex technical nature of the field is incorrect. Nothing precludes Congress from giving policy guidance that can be applied in light of such technical or variable inputs. In other sections of the CAA, for example, Congress directed EPA to require the best available technology or to target a standard based upon achievements of the best current practices in emission control. *See* 42 U.S.C. § 7412(d)(3) (basing "maximum degree of reduction in emissions" on "the emission control that is achieved in practice by the best controlled similar source"); *id.* § 7412(g)(2)(A) (referring to "maximum achievable control technology emission limitation"). Those standards offer discrete guidance while still allowing for evolving scientific knowledge.[7]

---

[7] Standards with discrete or determinable external referents do not guide subsequent policy discretion, but instead represent Congress making the relevant value choice itself by providing the balance and then directing the agency to fill in the blanks. Other discrete standards of this type could be expressed in terms of percentage reductions in mortality or maximum reduction in pollution up to a specified cost, thus making the value tradeoffs but still accommodating changing knowledge. *See, e.g.*, 42 U.S.C. § 7412(c)(9)(B)(i) (delisting of certain source categories based upon the absence of "a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source").

By pretending that the NAAQS revision is merely a scientific decision, rather than recognizing it as policy and value decision based upon scientific information, EPA ultimately masks the value choices being made behind a veneer of supposedly objective science. Hiding the ball in that manner, combined with the often impenetrable morass of the administrative rulemaking process, affirmatively undermines nondelegation values by reducing accountability for EPA's unacknowledged value choices.[8]

Scientific Guidance Does Not Provide Policy Guidance. Somewhat in tension with the claimed need for broad discretion in the face of scientific complexity, Petitioners also claim that Congress has provided sufficient substantive guidance with the requirement that NAAQS must be based on the air quality criteria under § 7408, which in turn must reflect "the latest scientific knowledge" and other variable information. Pet. Br. 31. Petitioners also claim to find adequate limits in EPA's requirement to consider and explain any deviations from the advice of the Clean Air Scientific Advisory Committee ("CASAC") regarding air quality criteria and standards. Pet. Br. 23; *see also ATA I*, 175 F.3d at 1059 (Tatel, J., dissenting) (because CASAC brings "scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects").

Neither the air quality criteria nor the latest scientific information imposes any substantive limit on the final NAAQS

---

[8] EPA's failure accurately to define and to acknowledge critical choices in the decision-making process also conflicts with the basics of the scientific method, which relies upon open and honest peer review and criticism to hone hypotheses regarding any given question.

that EPA may impose. They are merely factors in the mix, and absent overwhelming evidence that a pollutant could never cause harm, EPA claims it is free to impose NAAQS based on even unknown and speculative risks. *See* Pet. Br. 28. It is hard to imagine any pollutant for which EPA could not assert a basis for regulation or any NAAQS level it could not justify under these supposed limits.

For example, Petitioners' claim that existing NAAQS levels for ozone and PM were effectively an upper boundary because there were a "wide range of adverse health effects" below those levels, Pet. Br. 31, could just as easily have been inverted into a claim that such effects were insufficiently certain or did not rise to the level of a "public" health problem. The mere existence of some health effects is insufficient to require EPA to set a level lower than the prior NAAQS. And while EPA points to arbitrary lower boundaries of its own selection, Pet. Br. 31-32, those boundaries were not dictated by the statute. That EPA today came up with one result in response to various criteria does not deny that it could have come up with any other results merely by expressing a different "policy" choice. Section 7409 simply provides no limit on such choices by EPA.

CASAC's involvement likewise provides no intelligible principle directing EPA's policy discretion. EPA is free to disagree with CASAC's recommendations, and is guided only in the manner of its expressing, not in the values underlying, any potential disagreement. While CASAC may arguably provide some measure against which to test EPA's *factual* determinations, CASAC's *policy* recommendations hardly offer an "objective justification" for the eventual NAAQS. The policy preferences of scientists are no more objective than the policy preferences of EPA or of Congress. That is the nature of policymaking – it consists of choices made among competing values, not among objective facts. While CASAC may provide EPA with scientific information regarding elements of the policy choice to be made, the final

choice of NAAQS is no more scientific than any other policy decision.[9]

Procedural Checks Do Not Make Up for Substantive Limits. As for Petitioners' reliance on the various procedural checks of rulemaking and judicial review, Pet. Br. 23-24, the former does not address the substantive delegation problem and the latter is only as good as the supposedly intelligible principle set down in the first place. Procedural requirements placed on rulemaking merely seek to enhance the input, thoroughness, and instrumental rationality of agency action, but do not change the nature of the choice delegated. Such requirements may be valuable and arguably important in avoiding a due process problem, but if Congress neglects to make or guide the essential value choices, it has unconstitutionally delegated its fundamental power and duty. Instructing an executive agent to "think hard and be careful" may be sensible, but it adds nothing of substance.

For similar reasons, judicial review under the current statute does not mitigate the nondelegation problem because that review can offer no more substantive guidance or check than the statute itself. In the absence of standards from Congress, judicial review of the substance of EPA's choices would be either improper or impossible.

Thus, Judge Silberman's suggestion below to focus upon whether EPA's "final product was unreasonable" regardless of "whether the agency 'actually adhered to a disciplined decisionmaking process,'" *ATA II*, 195 F.3d at 15 (Silberman, J., dissenting) (citation omitted), simply invites courts to sub-

---

[9] Even if CASAC's policy choices did have some controlling weight, that would merely constitute a further delegation to private actors with even greater problems. *See Yakus*, 321 U.S. at 424 (observing that one problem with the statute in *Schechter Poultry* was that the "function of formulating the codes [of fair competition] was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated").

stitute their unguided policy views for EPA's. Even had Congress extended such an invitation to review for substantive "reasonableness," that would not be an intelligible principle, but rather a further and improper delegation to the courts.

If the requirement of a reasoned explanation is instead treated as a requirement of some modicum of internal consistency and some evidence of actual thought, it then collapses back to a procedural check and nothing more. Any choice among conflicting and irreconcilable values is possible as long as it is explained in sufficient detail. EPA's seemingly open-ended charge to protect the public health from unknown threats based on non-causal relationships thus defies review and defies guidance. Indeed, even EPA's methodologies apparently need not be consistently applied. Petitioners essentially admit the *ad hoc* nature of every decision EPA makes, arguing that because the inputs into the NAAQS process are so variable,

> "the most appropriate approach to establishing a NAAQS with an adequate margin of safety may be different for each standard under review. Thus, no generalized paradigm ... can substitute for the Administrator's careful and reasoned assessment of all relevant health factors in reaching such a judgment."

Pet. Br. 29 (quoting 62 Fed. Reg. at 38,688). It is difficult to imagine how that *ad hoc* process can be subject to arbitrary and capricious review – it is arbitrary by definition – and it is impossible to imagine how a court could *ever* question EPA's substantive judgments under this construction of § 7409.

Legislative History Undermines a Claim to Guidance. Petitioners' reliance on legislative history as providing some supposed guidance is surprising given that they cite very little of that history. Citing briefly to the D.C. Circuit's discussion of legislative history in *Lead Industries Association* v. *EPA*, Petitioners claim that they are limited to regulating based

upon only "adverse" health effects, which must be "medically significant, not merely detectable." Pet. Br. 24 (citing 647 F.2d 1130, 1152, 1155 (CADC), *cert. denied*, 449 U.S. 1042 (1980)). Of course, Petitioners promptly contradict themselves on this point, claiming that § 7409's requirement of an "adequate margin of safety" means NAAQS should be "preventative or precautionary," Pet. Br. 24, which in turn frees EPA from the need for "rigorous step-by-step proof of cause and effect," Pet. Br. 28 (citation and internal quotation marks omitted). Indeed, Petitioners claim EPA is free to target "hazards which research has not yet identified." Pet. Br. 28 (citation omitted).[10]

This very case demonstrates the lack of EPA's claimed constraint, given the agency's willingness and ability to regulate supposed hazards of questionable medical pedigree. Thus, regarding PM, EPA admits that "the relevant toxicological and controlled human studies published to date have not identified any accepted mechanism(s) that would explain how such relatively low concentrations of ambient PM might cause the health effects reported in the epidemiological literature" and admits its lack of knowledge "whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur." 62 Fed. Reg. at 38,656. In the face of such speculation, legislative history referring to "adverse" effects seems to offer no guidance at all.

The most to be gleaned from the legislative history is that Congress failed to confront the difficult choice it faced, and ultimately sent a mixed message. Thus, the House Report on the 1977 Amendments recognizes a no-risk plain reading of

---

[10] One might also note that when EPA proclaims a danger from low doses of a pollutant based upon extrapolation from evidence at much higher doses, the harm is not only of doubtful significance, it is not even "detectable" at all. Yet armed with a linear no-threshold hypothesis and a charge to be preventive and precautionary, EPA imposes untold costs based on what amounts to speculation and guesswork.

the NAAQS provision, but then seems to reject such a requirement, stating: "Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical. This is particularly true in light of the legal requirement for mandatory attainment of the national primary standards within 3 years." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 127 (1977) (quoted in *Lead Industries*, 647 F.2d at 1151 n. 41). Similarly, Senator Muskie expressed his view that "there is no such thing as a threshold for health effects" and consequently, "[e]ven at the national primary standard level, which is the health standard, there are health effects that are not protected against." 123 Cong. Rec. S9423 (daily ed. June 10, 1977) (quoted in *Lead Industries*, 647 F.2d at 1151 n. 41). Senator Muskie ultimately recognized how this view was at odds with the statutory language:

> I wish it were possible for the Administrator to set national primary and secondary standards that fully implement the statutory language .... The fact is, as testimony and documents disclose, the standards do not fully protect in accordance with the statutory language which gives the Administrator authority to provide for additional protection. He has had to make a pragmatic judgment in the face of the fact that he found there is no threshold on health effects, which makes it very difficult then to apply absolute health protection, and he has not been able to do that.

123 Cong. Rec. S9426 (daily ed. June 10, 1977) (quoted in *Lead Industries*, 647 F.2d at 1153 n. 43).

Having recognized and accepted the impossibility of conforming to the statutory language, Congress nonetheless failed to offer any guidance or to amend the statute to include an alternate standard. Rather than provide constitutionally adequate guidance, the legislative history demonstrates that in the context of nonthreshold pollutants § 7409 constitutes empty posturing with which EPA could not and did not comply. Indeed, the D.C. Circuit long ago recognized that the

charge "to protect against unknown dangers" is a "veritable paradox calling as it does for knowledge of that which is unknown" and the statutory "term 'margin of safety' is Congress's directive that means be found to carry out the task and to reconcile the paradox." *Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 81 (CADC 1978). But it was not until twenty years later that the D.C. Circuit recognized, in the decision below, that the only way to move past a paradox of this sort is through a naked political choice. Such paradoxical choices are among the most difficult in law making, but they necessarily belong to Congress and may not be delegated.

B. Mere Consideration of Costs and Benefits Offers No Intelligible Principle.

As noted above, *supra* at 17-19, *Amici* believe that the direct-health-only interpretation of § 7409 not only lacks an intelligible principle to guide EPA's value choices, it also invites either absurd or inevitably disingenuous results. A zero-risk, zero-concentration NAAQS, by effectively demanding the impossible, is facially absurd and, if required, would likely render § 7409 unconstitutional under the Fifth Amendment on both Due Process and Takings grounds. Alternatively, regardless whether EPA admits it, any nonzero stopping point for nonthreshold pollutants will inevitably be based on a balance of competing interests.

Given the alternatives of absurdity or dishonesty, it makes far more sense to adopt an available construction of the statute that allows the direct and open consideration of competing interests. EPA's current refusal, sanctioned by the D.C. Circuit, openly to take into account any effects other than direct health consequences from pollution is misguided and deeply troubling. Aside from ignoring or masking difficult cost and feasibility constraints that necessarily form part of any rational governmental process, EPA's blinders also ignore or mask competing *health* considerations. Thus, if an excessively stringent NAAQS diverts resources from more valu-

able efforts – even other pollution control efforts – EPA claims not to consider that when setting a particular standard. Rather than promoting health, therefore, EPA's approach could actually lead to a NAAQS that caused a *net loss* of life. Such a nonsensical construction of the statute ought to be avoided if at all possible. In that respect, *Amici* agree with Cross-Petitioners in No. 99-1426 that a more sensible construction of § 7409 is indeed available that would allow EPA to consider a variety of relevant interests.[11]

But *Amici* do not believe that the sensible inclusion of these additional considerations eliminates the nondelegation problem. If anything it potentially makes *that* problem worse. Expanding the range of values factoring into EPA's final decision, without guiding the balancing of those values, simply renders EPA's decision that much more "legislative" in nature. Without a hierarchy among the competing values, and some means of calibrating and comparing costs and benefits, the statute so construed would still lack an intelligible principle to guide EPA's substantive decisions concerning when costs exceeded benefits. As the many notable economists favoring cost-benefit analysis themselves recognize, "there may be factors other than economic benefits and costs that agencies will want to weigh in decisions, such as equity across generations," cost-benefit analysis "does not emphasize factors that are not easily quantified or monetized," and therefore it will be necessary in any such analysis to "give due consideration to factors that defy quantification but are thought to be important." Brief *Amici Curiae* of AEI-Brookings Joint Center for Regulatory Studies, *et. al.*, in No. 99-1426, at 10 (July 21, 2000). What this description illustrates is a perfectly sensible means of making legislative decisions, not an intelligible principle for an agency without legislative authority to "monetize" or otherwise give "due consideration" to competing values lacking a common denominator.

[11] *Amici* find room for additional considerations in § 7409's use of the words "requisite" and "adequate," in that section's incorporation of the criteria under § 7408, which cover more than just health, and in the requirement to consider CASAC recommendations and public comments, which need not be limited to or based solely upon health concerns.

Thus, even were EPA to develop "the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability," as hypothesized by the D.C. Circuit, *ATA I*, 175 F.3d at 1039, the statute offers no guidance as to how much harm is acceptable or how much expense Congress is willing to impose for each unit reduction in harm. While identifying, categorizing, and comparing the harm from air pollution all constitute sound scientific endeavors that may properly be delegated to agents, the final decision of what to do about such harm remains a political, not a scientific, judgment.

In other contexts, this Court has recognized that "a judgment about the appropriate level of expenditure for health care in light of the associated malpractice risk" is a judgment for Congress, not the Courts. *Pegram* v. *Herdrich*, -- U.S. --, --, 120 S. Ct. 2143, 2150 (2000). Likewise, the judgment concerning the appropriate level of cost to impose in light of the associated pollution risks is for Congress and not for an administrative agency. That "debatable social judgment," similar to the "judgments of social value" involved in determining "optimum treatment levels and health care expenditure," *id.* at --, 120 S. Ct. at 2150, is the type of fundamental policy judgment that lies at the heart of the legislative power.

C. Invalidation Is The Appropriate Remedy For Improper Delegation.

Although the D.C. Circuit was correct in holding that no intelligible principle guided EPA's discretion in setting NAAQS, the proper remedy is to declare the law unconstitutional and leave it to Congress, not to the agency, to provide the fundamental guidance lacking in the current statute. While a remand might have served certain administrative-law and due-process functions, it does not serve the "key function

of non-delegation doctrine, to 'ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress.'" *ATA I,* 175 F.3d at 1038 (quoting *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment).

As Judge Silberman correctly observed, it is "only this so-called 'third' purpose ... that has any connection to the doctrine's constitutional source." *ATA II*, 195 F.3d at 15 n. 2 (Silberman, J , dissenting from denial of rehearing *en banc*). Although Judge Silberman mistakenly concluded that there was no improper delegation, his separate critique of the remedy was on the mark:

> [The purpose of the nondelegation doctrine] is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. ... It hardly serves – indeed, it contravenes – that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act.[] Under that view Congress would be able to delegate almost limitless policymaking authority to an agency, so long as the agency provides and consistently applies an "intelligible principle."[]

Id. at 15 (footnotes omitted). The nondelegation doctrine requires that Congress actually make the hard choices and provide the substantive guidance for subsequent agency action. Delegating the task of providing guidance to the agency itself does not satisfy nondelegation requirements. If there is to be a remand in this case, it must be a remand to Congress to provide the guidance currently lacking.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the D.C. Circuit should be affirmed with instructions to invalidate the PM and ozone NAAQS.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: September 11, 2000.

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

36

No. 99-1257

IN THE
Supreme Court of The United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF AMICUS CURIAE OF LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AMERICAN SOVEREIGNTY ACTION PROJECT, GUN OWNERS FOUNDATION, PUBLIC ADVOCATE OF THE U. S., AMERICAN POLICY CENTER, 60 PLUS, TRUE BLUE FREEDOM, AND U.S. BORDER CONTROL IN SUPPORT OF RESPONDENTS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616
LAWRENCE J. STRAW, JR.
STRAW & GOUGH
Suite 300
12304 Santa Monica Boulevard
Los Angeles, CA 90025

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070
*Counsel of Record
Attorneys for Amici Curiae
September 11, 2000

BEST AVAILABLE COPY

36 AP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

INTRODUCTION 3

I. SECTION 109 OF THE CLEAN AIR ACT IS NOT INTELLIGIBLY RELATED TO ANY CONSTITUTIONALLY ENUMERATED POWER OF CONGRESS. 7

A. The Original CAA Invoked Congress' Constitutional Power to "Provide for the General Welfare." 7

B. The Current CAA Rests Upon a Presumed Power of Congress to Promote the General Welfare. 8

C. Section 109 of the CAA Is Not Intelligibly Related to Any Constitutional Power of Congress Concerning the General Welfare. .. 12

D. Section 109 of the CAA Is Not Intelligibly Related to Either the Commerce Clause or the Necessary and Proper Clause. 14

II. SECTION 109 OF THE CLEAN AIR ACT DOES NOT PROVIDE A GENERAL RULE TO WHICH THE EPA ADMINISTRATOR MUST CONFORM 17

A. Congress Must Provide a Rule of Conduct to Guide the Exercise of Administrative Discretion. 17

B. Section 109 of the Clean Air Act Does Not Provide a General Rule Controlling EPA Discretion. 19

Page

C. Section 109 Fails to Provide Any Meaningful Standard Limiting EPA Discretion. 21

D. The Constitution Prescribes that Congress is the Authorized Law Maker, Subject only to the Veto of the President. 25

III. THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE OBLIGES THIS COURT TO STRIKE DOWN SECTION 109 OF THE CLEAN AIR ACT. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Article I, Section 1 . . . . . 4, 27
Article I, Section 7 27
Article I, Section 8 25
Article I, Section 8, Clause 1 12

STATUTES
Clean Air Act, § 1 24
Clean Air Act, § 108 . . . . . 19, 20
Clean Air Act, § 109 . . . . . 2, *passim*
Clean Air Act, § 110 16
Pub. L. 159, 69 Stat. 322 (1955) 7
Pub. L. 88-206, 77 Stat. 392, §§ 1(a)(3), (4) (1963). 7, 8
Pub. L. 89-271, 992, § 202(a) (1965) 9
Pub. L. 90-148, 81 Stat. 491 (1967) 4
Pub. L. No. 91-604, 84 Stat. 1676 (1970) 4
42 U.S.C. § 7401 10
42 U.S.C. § 7408 . . . . . 13, 19
42 U.S.C. § 7409 . . . . . 13, 19
42 U.S.C. § 7416 21

CASES
A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925) 18
American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 21
American Trucking Ass'n v. United States, 175 F.3d 1034 (D.C. Cir. 1999) . . . . . 19, *passim*
Bowsher v. Synar, 478 U.S. 714 (1986) 29
Bradley v. The Washington, Alexandria, and Georgetown Steam Packet Co., 38 U.S. (13 Pet.) 89 (1839) 18
Carter v. Carter Coal Co., 298 U.S. 238 (1936) 20

Page

Fahey v. Mallonee, 332 U.S. 245 (1947) 8
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 25
Hampton & Co. v. United States, 276 U.S. 394 (1928) 5, 17, 18
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 16
I.N.S. v. Chadha, 462 U.S. 919 (1983) 27
Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607 (1980) 6
Kilbourn v. Thompson, 103 U.S. 168 (1881) 28, 29
Lead Industries Ass'n. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980) 14
Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827) 18
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 19, 26
Mistretta v. United States, 488 U.S. 361 (1989) 5, 26
National Cable Television Ass'n., Inc., v. United States, 415 U.S. 336 (1970) 5
The Nereide, 13 U.S. (9 Cranch) 388 (1815) 18
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 5, 18, 25
Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) ..... 5, *passim*
South Dakota v. Dole, 483 U.S. 203 (1987) 13
Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 8
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) ..... 7, *passim*
United States v. Butler, 297 U.S. 1 (1936) 12, 13
United States v. Morrison, 529 U.S. ___, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) 11
United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932) 21

Page

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 25

MISCELLANEOUS

Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J. 395 (1995) 4, 10
Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Env't. and Pub. Works Comm., 105th Cong., 1st Sess. 282 (1997) 13
1 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW 66 (3d ed. 1994) 4, 28, 29
Michael Fumento, *Science Under Siege* 22
House Report No. 91-1146 ..... 4, 10
J. LANDIS, THE ADMINISTRATIVE PROCESS (1938) 28
Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623, 84 Stat. 2086 (1970) 3
W. RODGERS, ENVIRONMENTAL LAW 130 (2d ed. 1994) . 7
Sources of Our Liberties (R. Perry, ed. 1978) 29
1 J. STORY, COMMENTARIES ON THE CONSTITUTION, § 907 (5th ed. 1891) 12
SUNSTEIN, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999) 22, 23, 24
L. TRIBE, AMERICAN CONSTITUTIONAL LAW 322 (2d ed. 1988) 12
1963 U.S. CODE CONG. & ADMIN. NEWS 1263. ..... 8, 12
1965 U.S. CODE CONG. & ADMIN. NEWS 3610 .... 9, 15, 16
1967 U.S. CODE CONG. & ADMIN. NEWS 1952 ..... 9, 15
1970 U.S. CODE CONG. & ADMIN. NEWS 5356. .... 4, *passim*

No. 99-1257

IN THE
Supreme Court of The United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF AMICUS CURIAE OF LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AMERICAN SOVEREIGNTY ACTION PROJECT, GUN OWNERS FOUNDATION, PUBLIC ADVOCATE OF THE U. S., AMERICAN POLICY CENTER, 60 PLUS, TRUE BLUE FREEDOM, AND U.S. BORDER CONTROL IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The *amici curiae*,[1] Lincoln Institute for Research and Education, American Sovereignty Action Project (a project of Citizens United Foundation), Gun Owners Foundation, Public

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Advocate of the United States, American Policy Center, 60 PLUS, True Blue Freedom, and U.S. Border Control, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States. All of the *amici* were established within the past 25 years for public education purposes related to participation in the public policy process, and are tax-exempt under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the correct interpretation of the United States Constitution and the laws of the United States. None of these *amici* have participated thus far in any aspect of this case before this Court or in the lower courts. In the past, most of the *amici* have conducted research on other issues involving constitutional interpretation, and have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues. [2]

SUMMARY OF ARGUMENT

Section 109 of the Clean Air Act ("CAA") effects an unconstitutional delegation of congressional power because it is not intelligibly related to any constitutional grant of power to Congress. The CAA originally rested upon the legislative power of Congress to "provide for the general welfare." The

---

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

current CAA rests upon a presumptive federal police power to promote the general welfare. As an exercise of a plenary power to promote the general welfare, section 109 of the CAA is not intelligibly related to any constitutional power of Congress in relation to the general welfare. As a delegation of power to regulate interstate commerce, or to regulate conditions substantially related to interstate commerce, section 109 is not intelligibly related either to the Commerce Clause or the Necessary and Proper Clause.

Section 109 of the CAA also effects an unconstitutional delegation of power because it does not provide a general rule to which the EPA must conform in setting National Ambient Air Quality Standards (NAAQS). Under the intelligible principle test, Congress must provide a rule of conduct to guide the exercise of administrative discretion. Section 109 does not provide such a general rule. Section 109 also fails to provide any meaningful standard governing the exercise of discretion. Thus, it violates the constitutional prescription that Congress is the authorized law maker, subject only to the veto of the president. The constitutional separation of powers doctrine obliges this Court to strike down the delegation of power in section 109 of the CAA.

ARGUMENT

INTRODUCTION

"On April 22, 1970, America celebrated the first Earth Day," setting off an "'environmental revolution" punctuated in the next four years by congressional enactment of "major legislation on virtually every facet of the environment: air pollution, water pollution, wild life protection, pesticides, and coastal zone management." At the head of the parade were the

Clean Air Amendments of 1970, enacted into law on December 31, 1970 on the heels of the newly-established Environmental Protection Agency (EPA), created just 29 days before. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J. 395, 395-96 (1995).

These new amendments to the Clean Air Act featured a brand new grant of power: "to establish nationwide ambient air standards." 1970 U.S. CODE CONG. & ADMIN. NEWS 5356-57, 5362. House Report No. 91-1146 explained the significance of this empowerment, contrasting the old law, under which the states set "ambient air quality standards," with the new, wherein the Administrator of the EPA would "establish nationwide standards based on criteria developed by him for various pollutants...." Id. at 5357, 5362, 5374.

To facilitate this fresh delegation of power, Congress, affirming the Administrator's existing authority to identify air pollutants "which in his judgment [have] an adverse effect on public health or welfare" (*see* Pub. L. 90-148, 81 Stat. 491 (1967)), granted the additional authority to set "national primary ambient air quality standards ... which **in the judgment** of the Administrator ... allowing an adequate margin of safety, are requisite to protect the public health." Section 109 of Pub. L. 91-604, 84 Stat. 1680 (1970) (emphasis added). Thus, the stage was set 30 years ago for the constitutional challenge now before this Court.

It is well-established by the opinions of this Court that Article I, Section 1 of the United States Constitution, which vests "all legislative powers herein granted in a Congress of the United States," acts "both as a grant of powers to Congress and as a prohibition on congressional delegation of legislative power to any other institution." 1 K. DAVIS and R. PIERCE, ADMINISTRATIVE LAW TREATISE 66 (3d ed. 1994) (hereinafter

Davis Treatise). Since Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) was decided 72 years ago, this Court has applied a singular constitutional test by which congressional delegations of power are to be measured: "[i]f Congress shall lay down by legislative act an **intelligible principle** to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (Emphasis added.) *See* Mistretta v. United States, 488 U.S. 361, 371-72 (1989).

Although this Court has not struck down a congressional delegation since the early New Deal (id., 488 U.S. at 373), the "intelligible principle" standard is not the child of an out-of-date court, as so many critics of the "nondelegation doctrine" insist. *See, e.g.,* 1 Davis Treatise, *supra,* at 66-74. First, the two New Deal opinions, striking down delegations under Franklin Delano Roosevelt's National Industrial Recovery Act, were not written by one of the court's four "curmudgeons" — Justices Van Devanter, McReynolds, Sutherland or Butler — but by the forward-looking chief justice, Charles Evans Hughes. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Indeed, in the much maligned, but never overruled, Schechter case, the thoroughly modern justice, Benjamin Cardozo, lent the prestige of his pen to affirm the nondelegation doctrine and the majority's holding. Id., 295 U.S. at 551-54. (Cardozo, J. concurring.)

Second, even though this Court has not struck down any congressional delegation since Schechter, the nondelegation doctrine and its "intelligible principle" test have guided this Court to adopt more restrictive interpretations of congressional delegations of power. *See, e.g.*, National Cable Television Ass'n., Inc., v. United States, 415 U.S. 336, 342 (1970); Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607,

646 (1980). To reach these interpretative solutions, this Court has examined both the statutory text and its legislative history, guided by the "intelligible principle" test. That test, in turn, requires the Court first, to identify the enumerated legislative power exercised by Congress. After all, the nondelegation doctrine is rooted in the same constitutional provision that limits Congress to the exercise of only the legislative powers "herein granted." As Justice Cardozo pointed out in his concurring opinion in Schechter, a delegation, in order to contain a principle that is **intelligible**, must reasonably relate to a specified congressional power. Thus, Justice Cardozo did not measure the delegation of power in Schechter to approve "codes of fair competition" developed by trade associations in relation to "whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected," but in relation to Congress's power under the "commerce clause," concluding that a delegation that runs "as wide as the field of industrial regulation ... is delegation running riot. No such plenitude of power is susceptible of transfer." Schechter, *supra,* 295 U.S. at 552-53.

The second prong of the "intelligible principle" test is whether Congress has laid down a "standard" governing the "means" by which its expressed policies are to be enforced. As Justice Cardozo put it in Schechter, there is no constitutional infirmity in giving to the executive branch the power to choose "the occasion" to act, but Congress must either lay down a statutory rule governing the means of enforcement, or use language that points to a preexisting rule "according to accepted business standards or accepted norms of ethics." Id., 295 U.S. 551-53.

Section 109 of the Clean Air Act fails both halves of the intelligible principle test, for it is neither an "intelligible"

exercise of an enumerated power, nor does it contain a meaningful "principle" to govern EPA discretion.

I. SECTION 109 OF THE CLEAN AIR ACT IS NOT INTELLIGIBLY RELATED TO ANY CONSTITUTIONALLY ENUMERATED POWER OF CONGRESS.

A. The Original CAA Invoked Congress' Constitutional Power to "Provide for the General Welfare."

The CAA originated in "the Air Pollution Control Act of 1955, that defined the federal role as being confined largely to research [declaring] that air pollution control responsibilities rested primarily with the states...." W. RODGERS, ENVIRONMENTAL LAW 130 (2d ed. 1994). Indeed, Congress expressly stated that it was "the policy of Congress to **preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution**." Public Law 159, 69 Stat. 322 (1955) (emphasis added). Thus, "Congress initially responded to the problem of air pollution by offering encouragement and assistance to the States." Train v. Natural Resources Defense Council ("NRDC"), 421 U.S. 60, 63 (1975).

When it amended the 1955 law by enacting the CAA of 1963, Congress remained steadfast, finding "that the prevention and control of air pollution at its source is the primary responsibility of States and local government," and limiting the federal role to that of "provider,"subsidizing and facilitating state and local government action. Section 1(a)(3) and (4) of Pub. L. 88-206, 77 Stat. 392, 393 (1963). Despite finding that the air pollution problem cut across state lines and was brought about "by urbanization, development and the increasing use of

motor vehicles," Congress chose to limit federal involvement to research and development, technical and financial assistance to state and local government air pollution programs, and encouragement and assistance to regional air pollution programs, all to the ultimate end "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 1(b) of Pub. L. 88-206, 77 Stat. 392, 393 (1963).

Even though the 1963 Act provided for federal assistance in "actions directed toward abatement of particular air pollution problems," House Report No. 508 insisted that the Clean Air Act continued to recognize the "primary **responsibilities and rights** of the States and local governments in controlling air pollution" because "[i]t is well established that the protection of the health and welfare of the citizens of a State is a proper subject for the exercise of the **State police power**." 1963 U.S. CODE CONG. & ADMIN. NEWS 1263, 1267 (emphasis added).

By recognizing the primary role of state and local government in the control of air pollution, and limiting the federal role to that of "provider," congressional efforts to control air pollution from 1955 through 1963 followed the well-established pattern of "dual federalism," the constitutionality of which has been unquestioned since Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

B. The Current CAA Rests Upon a Presumed Power of Congress to Promote the General Welfare.

In 1965, Congress breached this wall of "dual federalism," invading the regulatory territory of state and local governments with a grant of power to the Secretary of Health, Education and Welfare ("HEW") to regulate "the emission of any kind of substance, from any class or classes of new motor vehicles or

new motor vehicle engines, which **in his judgment** cause or contribute to, or likely to cause or contribute to air pollution which endangers the health or welfare of any persons...." Section 202(a) of Pub. L. 89-271 992 (1965) (emphasis added). House Report No. 899 defended this expanded federal role as necessitated by "trends of economic growth, technological progress, and rising urban populations," such that "air pollution, especially emanating from motor vehicles, affecting thousands of communities in all parts of the country are imposing a serious threat to public health and national welfare." 1965 U.S. CODE CONG. & ADMIN. NEWS 3610. The Report suggested, however, that the problem of motor vehicle emissions was an exception, not to be taken as a departure from Congress' view that control of air pollution remained as a "basic right ... and responsibilit[y] ... of States." Id. at 3612.

Two years later, Congress enacted the Air Quality Act of 1967. Although Congress reiterated verbatim the fourfold findings and purposes in the Clean Air Act of 1963, it extended the coercive power of the federal government, authorizing the HEW Secretary to set the criteria by which standards for ambient air quality were to be measured, and thereby fixing a national floor below which state and local governments could not go. If those governments failed to meet the federal minimum, Congress authorized HEW to take direct action to effect federal abatement based upon HEW's criteria, not just withhold federal funds. 1967 U.S. CODE CONG. & ADMIN. NEWS 1952-54.

Before the states could complete their "standard-setting and plan-preparation" duties under the 1967 Act, they were overtaken by the Clean Air Act Amendments of 1970, which, in the words of this Court, took "a stick to the States ... no longer giv[ing] [them] any choice as to whether they would meet [the] responsibility [to combat air pollution]." Train v.

NRDC, 421 U.S. at 64-65. This shift in power did not come as a result of new congressional findings that state and local air pollution control was inadequate, nor did it come from a deliberate expansion of the federal purposes in effecting air quality, as the findings and purposes of the CCA of 1963 remain unaltered even to this day. 42 U.S.C. § 7401. Instead, the change came from what House Report No. 91-1146 identified to be an irresistible "ground swell" of public opinion:

> Citizens and officials on the grassroots level throughout the United States have become seriously aroused over the threat of air pollution to health and well-being and they are anxious to have stringent controls imposed and enforced effectively at the earliest possible date.... This ground swell is important if we are to secure clean air everywhere in the United States, and it is important that this momentum not be lost. Therefore, it is urgent that Congress adopt new clean air legislation.... [1970 U.S. CODE CONG. & ADMIN. NEWS 5360.]

Although Congress expressed itself in generalities, it is not too difficult to chronicle the events to which this Report referred:

> On April 22, 1970 ... the first Earth Day [, o]ne hundred thousand people walked down New York's Fifth Avenue to demonstrate their concern for the planet. At 1500 college campuses and 10,000 schools, many thousands more participated in teach-ins and other ecological happenings. Politicians rode bicycles. Demonstrators protested ... air pollution by smashing automobiles with sledgehammers. From Clarksburg, West Virginia ... to San Francisco, California..., the nation displayed its dismay at the state of the environment. [Anderson, *The*

> *Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J., at 395.]

In its haste not to be left behind by this "environmental revolution," Congress did not bother to spell out why it had finally discarded the "dual federalism" approach to air pollution control, and to assign to the EPA primary responsibility for regulating ambient air quality. Normally, when Congress decides to impose a national regulatory standard, when its purpose is to protect the health, safety or welfare of the people, Congress relies upon its powers to enact laws that are necessary and proper to regulate interstate commerce as justification for its intrusion upon state "police power." *See, e.g.,* United States v. Morrison, 529 U.S. ___, 120 S.Ct. 1740, 146 L.Ed. 2d 658, 674, 683-88 (2000). But Congress did not do that here. Rather, from the beginning, Congress has indicated that, when it comes to air pollution, its overriding objective has always been "to promote the public health and welfare."

In 1955, it placed responsibility for the federal effort to combat air pollution in the Department of HEW, with the nation's Surgeon General playing a prominent role. Train v. NRDC, *supra,* 421 U.S. at 63. This continued until 1970 when the EPA was established. The change from HEW and the Surgeon General to the EPA and its Administrator did not signal a change in constitutional purpose or policy. As previous Congresses were concerned with the public health in the first 15 years of combating air pollution, so, according to Conference Report No. 91-1783, was the 91st Congress concerned when it enacted the Clean Air Act Amendments of 1970: "The [national ambient air quality] standards were to be adequate to protect the health of persons. The goals were to be adequate to protect the public health or welfare from any adverse effects." 1970 U.S. CODE CONG. & ADMIN NEWS 5376.

Yet, as Congress previously acknowledged, a regulation that "protect[s] ... the health and welfare of the citizens of a State is proper ... exercise **of the State police power**." 1963 U.S. CODE CONG. & ADMIN. NEWS 1267 (emphasis added). So long as Congress linked federal involvement to funding, and other "providing" functions, Congress operated within its power to "provide for the general welfare." *See* United States v. Butler, 297 U.S. 1, 64 (1936). Once it moved beyond setting national standards in conjunction with its "spending power," however, Congress began to impose direct regulations for the purpose of promoting the general welfare, presuming that it had, like the states, a general police power.

C. Section 109 of the CAA Is Not Intelligibly Related to Any Constitutional Power of Congress Concerning the General Welfare.

Since United States v. Butler, *supra*, it has been settled that the General Welfare Clause "confers [upon Congress] only a power to spend [not an] independent power to regulate." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 322 (2d ed. 1988). As Justice Joseph Story observed, if Article I, Section 8, Clause 1 confers upon Congress the power to "provide for the common defense and general welfare," independent from the power "to lay and collect taxes," then "the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION, § 907 (5th ed. 1891).

Although Congress' "general welfare" power must be tied to its power to appropriate money from the federal treasury, it may use its "spending power" to accomplish purposes outside those enumerated in the constitutional text. United States v. Butler, 297 U.S. at 65-67. Congress may accomplish such

purposes, however, only by conditioning the receipt of federal subsidies upon compliance with national standards. Thus, it may, pursuant to its "general welfare" power, impose national standards upon the states only if the states choose to take the federal funds. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

According to the legislative history and the statutory text, Congress has occupied the field of ambient air quality **solely** in pursuit of the "public health and welfare." Thus, section 108 of the CAA instructs the EPA Administrator to continue to develop "air quality criteria" for "each pollutant ... emissions of which, **in his judgment**, cause or contribute to air pollution which may reasonably be anticipated to endanger **public health or welfare**." Section 109, in turn, instructs the Administrator to take "such criteria and allowing an adequate margin of safety," prescribe "primary ambient air quality standards" that are "requisite to protect the **public health**" and "secondary ambient air quality standards" that are "requisite to protect the **public welfare** from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. §§ 7408(a), 7409(b).

According to the EPA, and lower court opinions construing this language in light of the legislative history, the EPA Administrator must not consider "economic costs," or engage in any other kind of "cost/benefit" analysis, in the setting of the NAAQS. Indeed, the EPA has scrupulously abstained from taking such costs into consideration, limiting its focus solely to the factors of "public health" or "public welfare." *See Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Env't. and Pub. Works Comm.*, 105th Cong., 1st Sess. 282 (1997). And the United States Court of Appeals for the District of Columbia Circuit has read Section 109(b)(1) of the CAA as

barring the EPA from considering even technological feasibility, ruling that the sole objective of the CAA is to protect public health. Lead Industries Ass'n. v. EPA, 647 F.2d 1130, 1149-56 (D.C. Cir. 1980). *Accord*, Train v. NRDC, 421 U.S. at 78 ("[P]rimary ambient air standards deal with the quality of outdoor air and are fixed on a nationwide basis at levels which the Agency determines will protect the public health.")

Had Congress continued to pursue this singular goal of public health in the setting of NAAQS by means of its spending power, then providing a one-dimensional guide to the EPA could have been intelligibly related to its constitutional power to "provide for the general welfare." But it did not give the states a choice to comply with the NAAQS at the risk of losing federal air pollution control subsidies. Rather, as this Court ruled in Train v. NRDC, "they [the States] were required to attain air quality of specified standards, and to do so within a specified period of time." 421 U.S. at 65. Thus, the standard in Section 109 of the CAA governing the power of the EPA to set NAAQS cannot possibly be justified as intelligibly related to the "public health and welfare," because Congress has no general police power under the Constitution to promote the public health and welfare . To paraphrase Justice Cardozo's concurring opinion in Schechter, *supra*, 295 U.S. at 552-53, "[n]o such plenitude of power is susceptible of transfer," because Congress does not have plenary power to promote the general "well-being" of the people.

D. Section 109 of the CAA Is Not Intelligibly Related to Either the Commerce Clause or the Necessary and Proper Clause.

As noted above, it is a vain search, indeed, to seek in the legislative history leading up to the Clean Air Amendments of

1970 any congressional expressions of concern that air pollution was having an adverse impact on the national economy. The House Report supporting the imposition of national standards on motor vehicle emissions focused solely upon the "health problems arising out of automotive air pollution," concluding that "exhaust control standards on a national scale are necessary and would be of benefit to the entire country." 1965 U.S. CODE CONG. & ADMIN. NEWS 3611-12. Similarly, in 1967, Congress authorized the HEW Secretary "to proceed immediately to court for abatement of any pollution that creates substantial and imminent public health endangerment ... regardless of technological and economic feasibility." 1967 U.S. CODE CONG. & ADMIN. NEWS 1954-55. Not surprisingly, then, when Congress enacted the 1970 amendments, authorizing the EPA Administrator to fix NAAQS, it did so out of regard for "the health and well-being of the American people," not the health and well being of the national economy. Congress did not even dictate to the EPA that it must take into account both "technological feasibility" and "economic costs" in the setting of NAAQS, whatever the source, although it had previously instructed the EPA to consider both factors in setting the standards for emissions from a single source, the motor vehicle. *Contrast* House Report No. 899 in 1965 U.S. CODE CONG. & ADMIN. NEWS 3616 *with* House Report No. 91-1146 in 1970 U.S. CODE CONG. & ADMIN. NEWS 5356-57, 5362.

In the past, when Congress has invoked its powers under the Commerce Clause, and its familiar companion, the Necessary and Proper Clause, it has limited the scope of its regulation accordingly. For example, when Congress legislated against the "moral wrong" of racial discrimination in the 1964 Civil Rights Act, the ensuing prohibitions against that moral wrong were tailored to its adverse impact on interstate commerce. It did not legislate against racial discrimination

generally, even though one of the stated purposes of the 1964 Act was "to promote the general welfare by eliminating discrimination based on race...." *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

Congress chose not to follow this pattern, however, with the Clean Air Act. Having stated as one of its purposes "to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," Congress not only gave the EPA, by the terms of Section 109, *carte blanche* to set nationwide ambient air standards without regard for any factor related to the national economy, but also, by the terms of Section 110, did not condition the timetable for implementation and enforcement of those ambient air standards upon findings related to the economy. 1970 U.S. CODE CONG. & ADMIN. NEWS 5363-65. Even though the original timetable of Section 110 has been changed, the implementation section of the statute has never been construed as a grant of "exceptions" to the standards, such exceptions being confined to those permitted under Section 110(f), after a finding, among other things, that "the continued operation of [the polluting] source is essential to national security or to the public health or welfare." *See generally* Train v. NRDC, 421 U.S. at 78-99.

By making "requisite to protect the public health" the single factor by which the EPA Administrator determines national primary ambient air quality standards, and by making "requisite to the public welfare" the single factor by which the EPA Administrator sets such secondary standards, Congress divorced the Clean Air Act and its 1970 Amendments from the Commerce Clause and the Necessary and Proper Clause. Thus, neither factor meets the "intelligible" prong of the "intelligible principle" test that this Court has applied in the enforcement of its nondelegation doctrine. Again, paraphrasing Justice

Cardozo's opinion in Schechter, Congress has authorized the EPA to set such NAAQS as it thinks "desirable or helpful for the well-being or prosperity" of the nation: "[t]his is delegation running riot. No such plentitude of power is susceptible of transfer." Schechter v. United States, 295 U.S. at 553.

II. SECTION 109 OF THE CLEAN AIR ACT DOES NOT PROVIDE A GENERAL RULE TO WHICH THE EPA ADMINISTRATOR MUST CONFORM.

A. Congress Must Provide a Rule of Conduct to Guide the Exercise of Administrative Discretion.

In the seminal case of Hampton & Co. v. United States, 276 U.S. 394 (1928), this Court stated that the "intelligible principle" test could be satisfied only if Congress declared the "general rule ... to which the person or body authorized" to act "is directed to conform." Id., 276 U.S. at 408, 409. In so ruling, the Court simply adopted a phrase, the meaning of which had been previously settled in its opinions dating back to its early history.

In 1815, Chief Justice John Marshall illustrated the meaning of "intelligible principle" by equating it to a statement of a general rule of law, as contrasted to one of the rule's many applications:

> The **rule** that the goods of an enemy found in the vessel of a friend are a prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored ... is founded on the simple and **intelligible principle** that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the

propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. [The Nereide, 13 U.S. (9 Cranch) 388, 418-19 (1815) (emphasis added).]

Twelve years later, Justice Bushrod Washington expressed the same understanding that a statement of an "intelligible principle" was equivalent to a statement of a general rule. Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting). In 1839, Justice Phillip Barbour in similar manner equated a general rule governing the interpretation of written contracts to a statement of "intelligible principle." Bradley v. The Washington, Alexandria, and Georgetown Steam Packet Co., 38 U.S. (13 Pet.) 89, 97 (1839). Ninety years later, this Court still indicated that to be "intelligible," a law must establish a meaningful "'standard of duty'" or a "'prohibition by which conduct can be governed,'" or otherwise '[i]t is not a rule at all; it is merely exhortation and entreaty.'" A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 240 (1925).

In light of such usage, this Court found that Congress was not required to write a statute with such precision as to direct the President in "the details of its execution," but that it was perfectly "intelligible" for Congress to lay down a general rule of reciprocal equality in the fixing of tariffs, leaving it to the President only "to ascertain and declare the event upon which [Congress'] expressed will was to take effect." Hampton & Co. v. United States, 276 U.S. at 404, 406, 410-11. On the other hand, this Court ruled in both Panama Refining Co. v. Ryan, 293 U.S. at 415, 418, 427, 430, and Schechter v. United States, 295 U.S. at 541, that Congress had failed to meet the "intelligible principle" test because it had failed to lay down a

"general rule" governing the exercise of presidential discretion.

B. Section 109 of the Clean Air Act Does Not Provide a General Rule Controlling EPA Discretion.

Section 109(b)(1), on its face, does not state a general rule guiding the discretion of the EPA Administrator in setting NAAQS. To the contrary, it is left to "the **judgment** of the Administrator" to determine those standards for each air pollutant "which **in his judgment** has an adverse effect on public health or welfare" and for which he has developed air quality criteria, "allowing [for] an adequate margin for safety, [as] are requisite to protect the public health [or] welfare." 42 U.S.C. §§ 7408 and 7409 (emphasis added). As pointed out by the majority opinion below, neither Section 109 nor Section 108 of the CAA provides any "determinate criterion for drawing lines," leaving "it free to pick any point between zero [risk to the public health or welfare] and a hair below the concentrations yielding London's killer fog." American Trucking Ass'ns v. United States (hereinafter A.T.A. v. U.S.), 175 F. 3d 1034, 1037 (D.C. Cir. 1999).

Even the dissent below did not find that either Section 109 or Section 108 set forth a general rule by which to measure the EPA Administrator's discretion. To the contrary, the dissent admitted that the Clean Air Act requires the Administrator to "set pollution standards at levels *necessary* to protect the public health, whether 'reasonable' or not, whether 'appropriate' or not." Id., 175 F.3d at 1058. As Chief Justice John Marshall pointed out in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-21 (1819), the word "necessary" signifies a matter of discretion, not one of obligation, and, if applied to Section 109, it can mean any air quality standard that facilitates, in the unreviewable opinion of the Administrator, the goals of public health or welfare.

Implicitly recognizing this fact, the dissent below made a valiant attempt to maintain that EPA must base its standards on "air quality criteria" that accurately reflect the latest scientific knowledge" and that "the EPA followed the guidelines published by the American Thoracic Society," setting "the ozone and fine particle standards within ranges recommended by the CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act." ATA v. U.S., 175 F.3d at 1058-61. As the majority observed, however, the "question whether EPA acted pursuant to lawfully delegated authority is not a scientific one." Id., 175 F. 3d at 1036. Moreover, the statute creating the scientific advisory committee contains no rule governing that committee's discretion. And even if it did, it would run afoul of the absolute rule that Congress may not delegate such power to "private persons whose interests may be and often are adverse to the interests of others" who are affected by the regulation. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

In a final effort to rescue Section 109, the dissent below suggested that "[b]ecause the Clean Air Act gives politically accountable state governments primary responsibility for determining how to distribute the burdens of pollution reduction, and therefore how NAAQS will affect specific industries and individual businesses, courts have less reason to second-guess the specificity of the congressional delegation." A.T.A. v. U.S., 175 F.3d at 1061. Just the opposite is the case. According to the Necessary and Proper Clause, it is for Congress, **not** the states, to "make all laws which shall be necessary and proper for carrying into Execution" the powers granted in the Constitution. Moreover, as this Court has already established, the power of the states granted under Section 110 of the Clean Air Act has **nothing** to do with the

setting of the national ambient air standards,[3] but only the implementation and enforcement of them. Train v. NRDC, 421 U.S. at 64-65, 79, 89-90.

C. Section 109 Fails to Provide Any Meaningful Standard Limiting EPA Discretion.

It has often been stated by this Court that it is enough if a statute contains a meaningful standard guiding the discretion of the administrative agency, and that such a standard may be gleaned either from words with meanings acquired through long-standing customs analogous to the common law (United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932)) or "from the purpose of the Act, its factual background and the statutory context in which they appear." American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

In his concurring opinion in the Schechter case, Justice Cardozo allowed that Congress may use words with prepackaged meanings because of the historical gloss that has been placed upon those words in accordance with commercial business practices and social customs. It is one thing, Justice Cardozo observed, to use such words as "unfair" which connote wrongdoing "according to accepted business standards or accepted norms of ethics," but it is quite another to use such words as "fair" which connote "whatever ... may be desirable or helpful for ... well-being or prosperity...." With respect to words of the latter type, Justice Cardozo opined, their function "is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses." Hence, he concluded, such "positive" words must be defined with

---

[3] State and local governments may set higher **state** and local standards, but not national ones. *See* 42 U.S.C. § 7416.

precision, lest they open the floodgates of regulation without sufficient congressional limitation. Schechter Poultry Corp. v. United States, 295 U.S. at 552-53.

The phrases, "requisite to protect public health" and with an "adequate margin of safety" are unknown to the common law, without reference, for example, to the language of nuisance or trespass. Thus, unlike a term such as "unfair competition," which has a common law reference point, such phrases do not convey a "limited concept." *See* id., 295 U.S. 531-32. Nor are they referents to medical, scientific or other terminology with commonly understood meanings.[4] Moreover, the words used in Section 109 are of the "positive," not "negative," type. As Professor Cass Sunstein has recently observed, both the provision in Section 109 relating to public health and the one relating to the public welfare "appear to contemplate the existence of 'safe thresholds.' The basic idea is that EPA should ensure that the air is 'safe' and the public welfare is 'protected.'" SUNSTEIN, *Is the Clean Air Act Constitutional?*, 98 MICH. L. REV., 303, 314. Thus, the Clean Air Act is designed not just to eliminate "unclean" air, but to

[4] Those who are unfamiliar with the realities of environmental law, when reviewing goals such as "adequate margin of safety" and "requisite to protect public health," cannot appreciate the roaring scientific debate as to what levels of emissions are permissible under such terms. Not only is it difficult to reach agreement on appropriate models to analyze emissions, the level of emission at which any particular pollutant is harmful is not always rationally determinable. Allowing the Administrator then to pick an emission level providing an "adequate margin of safety," particularly with cost not being a consideration, serves further to remove the final emission standard from an objectively supportable standard. For a discussion of just some of the disputes underlying the setting of such standards, *see* Michael Fumento, *Science Under Siege*, chapter 2, "Of Mice (and Rats) and Men: The Politics of Cancer Testing" and chapter 3, "A Fairly Brief Nonboring Lesson in the Pitfalls of Amateur Epidemiology."

achieve "clean" air, not just to eliminate "unhealthy" industrial facilities, but to promote "healthy" facilities. But, as Professor Sunstein has also observed, the statute provides absolutely no guidance to the EPA as to how "safe," or how "clean" and how "healthy" the air must be. Even the chairman of the EPA's Scientific Advisory Committee has "unambiguously confess[ed] ... the impossible nature of the task imposed on EPA by the Act." Id., 98 MICH. L. REV., at 315.

In short, the EPA is a 1970's version of the NIRA, which Justice Cardozo described as having been set up to enact a "comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption." Schechter, 295 U.S. at 553.

This uncertainty of meaning is compounded, rather than resolved, by examining the "purposes" of the Act, its factual findings, and statutory context. The statement of purpose of the Clean Air Act is as broad and extensive, if not more so, than that in the discredited NIRA. Section 109(b)(1) of the CAA reads:

> to protect the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.

The declaration of policy in the NIRA read, in relevant part:

> to provide for the general welfare ... to promote the fullest possible utilization of the present productive capacity of industries... and otherwise to rehabilitate industry and to conserve natural resources. [Schechter, 295 U.S. at 531, n. 9.]

Thus, "requisite to the public health," like the term "fair competition" in the NIRA, is no more than a "convenient designation for whatever set of laws the formulators of a code ... may ... prescribe as being wise and beneficent provisions ... to accomplish the broad purposes of rehabilitation [and] correction...." Id., 295 U.S. at 531.

The findings of the CAA do nothing to narrow that Act's broad purpose. Rather, the finding in Section 1(a)(2) acknowledges that air pollution is a "complex" subject that has a wide-ranging adverse impact upon people, places and things. Yet Congress has made no specific findings that would give policy direction to the Administrator charged with enforcing the Act. This glaring omission has led one astute commentator to observe that "[t]he day will eventually come when the same court of appeals holds that EPA has behaved unlawfully both for regulating above a certain level and also for not regulating below that level." Sunstein, *supra*, 98 MICH. L. REV. at 322.

D. The Constitution Prescribes that Congress is the Authorized Law Maker, Subject only to the Veto of the President.

The decision of the majority below, while giving lip-service to the nondelegation doctrine, has ordered a remedy that would emasculate it. It gives up on the idea that Congress makes the rules in favor of a remedy whereby "[t]he agency will make the fundamental policy choices," after being given "an opportunity to extract a determinate standard on its own." A.T.A. v. United States, 175 F.3d at 1038. In doing so, it has adopted Kenneth Culp Davis' view that the nondelegation doctrine is "dead" and that Congress cannot "be expected to legislate specifically, and should not be asked to do so," so long as "agencies could be required to develop protections against uncontrolled discretionary power, and to adhere to them."

Sunstein, "Is the Clean Air Act Unconstitutional?," 98 MICH. L. REV., at 340. Such a doctrine of "administrative self-restraint" has no place in a Constitution that, after vesting "all legislative powers herein granted" in "a Congress of the United States," Constitution, Art. I, Sec. 1 enumerates as one of those powers, "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers." Id., Art. I, Sec. 8.

As Justice Hugo Black put it in the "steel seizure" case, it is Congress, not the President (and certainly not any administrative agency composed of persons who are not even constitutional officers), which determines not only the public policies of the nation, but the "manner" by which such policies are to be executed. Thus, it is for Congress to adopt a particular policy, and then to promulgate the "rules of conduct to be followed" in pursuit of such policy. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952). Whatever rules are adopted by an executive or administrative officer, as this Court dictated in both Panama Refining, 293 U.S. at 428-29, and Schechter, 295 U.S. at 529-30, must be "subordinate" to the rules laid down by Congress. If Congress has laid down no general rule, then such rules can hardly be of this subordinate class.

Indeed, if Congress does not make the rules governing interstate commerce, then Congress has failed to exercise the power vested in it by Article I, Section 8, Clause 3. As Chief Justice John Marshall ruled in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824), "the power to regulate ... is **to prescribe the rule** by which commerce is to be governed, [and] this power, like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent...." (Emphasis added.) As to this "plenary ... power over commerce ... among the several states," it was "vested in Congress as absolutely as

it would be in a single government," thus making Congress the sole depository of that power:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances...the sole restraints on which they have relied, to secure them from its abuse. [Id.]

If Congress passes the buck, transferring to an administrative agency the power to "prescribe the rule by which commerce is to be governed," then it has undermined this vital constitutional principle of electoral accountability to the people. Likewise, if Congress transfers to such an agency the power to determine the "manner" in which its declared policies are to be implemented, it has transferred to that agency the power to determine the "necessary and proper" means by which its policies are to be executed. Chief Justice Marshall also ruled, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that it was Congress, not the courts (*a fortiori* not any administrative agency with judicial power), in which the people had "confid[ed] the choice of means" so as not "to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Id., 17 U.S. at 415.

Today, however, this Court has permitted departures from these salutary rules, succumbing to the claim that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." Mistretta v. United States, 488 U.S. 361, 372 (1989). Even if that were so, it would not justify adjusting the Constitution's commitment to the vesting of "all" legislative powers in a Congress of the United States, as provided for in

Article 1, Section 1. Nor does it justify substituting some kind of administrative process for making the rules for the constitutionally mandated bicameral and presentment process in Article I, Section 7, no matter how "clumsy, inefficient, even unworkable" those processes may appear. *See* I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).

III. THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE OBLIGES THIS COURT TO STRIKE DOWN SECTION 109 OF THE CLEAN AIR ACT.

Prior to the 20th century, this Court unwaveringly adhered to the constitutional division of powers among the legislative, executive and judicial branches. In 1881, an unanimous court — composed of such experienced jurists as Justices Samuel F. Miller, Stephen J. Field and John Marshal Harlan — stated that the Constitution had "blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, legislative, and judicial departments of the government" and prophetically warned:

> [t]he increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them." [Kilbourn v. Thompson, 103 U.S. 168, 191 (1881).]

The Court could not have been more prescient. By the end of the first third of the 20th century, the Court's prophetic concern that "new realities" would trump the constitutional separation of powers came to pass. Harvard Law School Dean, James Landis, put it this way:

> The last century has witnessed the rise of a new instrument of government, the administrative tribunal.... In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.... [W]hen government concerns itself with the stability of an industry it is only intelligent realism for it...[to vest] the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization. [J. LANDIS, THE ADMINISTRATIVE PROCESS 1, 11-12 (1938).]

Not surprisingly, this Court's opinion in Kilbourn v. Thompson, *supra*, came under attack by those who spearheaded this administrative law "innovation." Recognizing that the "typical administrative agency exercises many types of power, including executive, legislative, and judicial power," Kenneth Culp Davis, one of the 20th century's leading legal realists, recognized that "a strict application of the theory of separation of powers would make the very existence of such an agency unconstitutional." 1 K. DAVIS & R.PIERCE, ADMINISTRATIVE LAW 24 (3d ed. 1994). He and others have valiantly attempted to deconstruct the Constitution's separation of powers, claiming that the "doctrine of separation of powers has remarkably little support in the language or the history of the Constitution" and that justices of this Court have "apparently indulged in the mistaken belief that the Constitution includes

a separation of powers requirement." 1 K. DAVIS & R. PIERCE, at 34.

Davis and others have claimed that while "Articles I, II, and III establish three Branches of government ... they say little about the powers of each." Id. Just because the Constitution does not contain a definition of the three kinds of powers does not mean that there is no meaningful legal distinction between legislative, executive and judicial powers. Indeed, the Constitution "says little" about the freedom of speech, the freedom of the press, and due process of law, but that has not prevented this Court from finding in those terms significant limits upon the power of government. To be sure, the members of this Court in several recent cases have differed in their understandings of the meaning of legislative, executive and judicial powers, *e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986), but differences of opinion over the meaning and application of the First Amendment have not deterred this Court from deciding the meaning of its terms.

If this Court should decline to adjudicate the legal norms that command separation of the legislative, executive and judicial powers, and continue to permit Congress to delegate its lawmaking powers to administrative agencies, then it will not be putting its judicial imprimatur upon a "new instrument of government," as James Landis claimed in 1938, but on an "old instrument of tyranny." For it was during the Middle Ages that the Court of Star Chamber reigned supreme in England, exercising "broad and undefined executive, legislative and judicial powers" over such matters as "trades and businesses and the conduct of elections ... and of printing." SOURCES OF OUR LIBERTIES 125, 130 (R. Perry, ed. 1978). Only after the Star Chamber was abolished by Parliament in 1648 was "due process of law as established by Magna Carta" restored in England. Id. at 125. Only by ruling that Section 109 of the

CAA effects an unconstitutional delegation of legislative power will this Court will take a similar step towards restoration of the rule of law in America.

CONCLUSION

For the reasons stated herein, the decision of the court below, that Section 109 constitutes an unconstitutional delegation of legislative power, should be affirmed and the case remanded with instructions to dismiss.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

LAWRENCE J. STRAW, JR.
STRAW & GOUGH
Suite 300
12304 Santa Monica Blvd.
Los Angeles, CA 90025
(310) 826-7766

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070
Attorneys for *amici curiae*
* *Counsel of Record*

September 11, 2000

(31)

No. 99-1257

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF GARY E. MARCHANT, CARY COGLIANESE, DANIEL M. BYRD III, GAIL CHARNLEY, MAUREEN L. CROPPER, E. DONALD ELLIOTT, DAVID L. FAIGMAN, JAMES K. HAMMITT, JAMES E. KRIER, WILLIAM H. LASH III, ROGER O. McCLELLAN, THOMAS W. MERRILL, LARS NOAH, JOYCE E. PENNER, ROBERT PHALEN, JEFFREY J. RACHLINSKI, JOSEPH SANDERS, ROBERT N. STAVINS, JONATHAN B. WIENER and JAMES D. WILSON IN SUPPORT OF RESPONDENTS

GARY E. MARCHANT
Center for the Study of Law, Science and Technology
Arizona State University College of Law
P.O. Box 877906
Tempe, AZ 85257-7906
(480) 965-3246

CARY COGLIANESE
Counsel of Record
Harvard University
John F. Kennedy School of Government
79 John F. Kennedy Street
Cambridge, MA 02138
(617) 495-1402

September 11, 2000

BEST AVAILABLE COPY

29pp

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI* 1

BACKGROUND 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. SCIENCE ALONE CANNOT PROVIDE A BASIS FOR RISK MANAGEMENT DECISIONS 4

A. Science Describes and Explains 5
B. Risk Management Prescribes 5
C. Agencies Can Use Science as a "Charade" 8

II. SCIENCE ALONE CANNOT PROVIDE A BASIS FOR THE OZONE AND PM NAAQS 9

A. Science Alone Cannot Guide Standard-Setting for Non-Threshold Air Pollutants 10
B. EPA's Exclusive Reliance on Science to Justify its Standards Creates the Appearance of a "Charade" 12

III. PRINCIPLED STANDARD-SETTING REQUIRES CONSIDERATION OF MORE THAN SCIENCE 15

CONCLUSION 18

APPENDIX: IDENTIFICATION OF *AMICI* 19

TABLE OF AUTHORITIES

Page

Cases:

Baltimore Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983) 12
Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 5
Industrial Union Dep't v. American Petroleum Inst.,
448 U.S. 607 (1980) 7

Statutes:

Clean Air Act §108(a)(2), 42 U.S.C. § 7408(a)(2) 2
Clean Air Act §109(b)(1), 42 U.S.C. §7409(b)(1) 1
Clean Air Act §307(d), 42 U.S.C. §7607(d) 2

Miscellaneous:

54 Fed. Reg. 38,044 (Sept. 14, 1989) 15
61 Fed. Reg. 17,960 (Apr. 23, 1996) 8
62 Fed. Reg. 38,856 (July 18, 1997) 2,3,6,10,11
62 Fed. Reg. 38,652 (July 18, 1997) 2,11
63 Fed. Reg. 43,756 (Aug. 14, 1998) 8
Air Quality Standards: Science-Driven Ozone, PM Proposals Will Be Finished by July 19, EPA Says,
27 ENV'T REP. (BNA) 2068 (Feb. 14, 1997) 3
Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, Paul R. Portney, Milton Russell, Richard Schmalensee, V. Kerry Smith, and Robert N. Stavins, *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCIENCE 221(1996) 17
Testimony of Carol M. Browner, EPA Administrator, Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Comm. on Government Reform and Oversight (Apr. 23, 1997) (1997 WL 10571215) 3

DANIEL M. BYRD III & C. RICHARD COTHERN, INTRODUCTION TO RISK ANALYSIS: A SYSTEMATIC APPROACH TO SCIENCE-BASED DECISION MAKING (2000) 6
J. CLARENCE DAVIES, COMPARING ENVIRONMENTAL RISKS (1996). 16
George Eads, *The Confusion of Goals and Instruments: The Explicit Consideration of Cost in Setting National Ambient Air Quality Standards*, in MARY GIBSON (ed.), TO BREATHE FREELY: RISK, CONSENT, AND AIR 222 (1985) 14
EPA, Science Policy Council, *Guidance for Risk Characterization* (Feb. 1995) 7,8
DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW (1999) 13
Joseph M. Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 ENVTL. LAW 821 (1994) 13
Congressional Testimony of John D. Graham, Director of Harvard Center for Risk Analysis, on Clean Air Act Reauthorization (Oct. 14, 1999) (1999 WL 27595650) 9,14
JOHN D. GRAHAM & JONATHAN B. WIENER (eds.), RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (1995) 16
C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 Tul. Envtl. L. J. 235 (1998) 14
Sheila Jasanoff, *Contested Boundaries in Policy-Relevant Science*, 17 SOC. STUD. SCI. 195 (1987) 6
MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS (1990) 14
WILLIAM W. LOWRANCE, OF ACCEPTABLE RISK: SCIENCE AND THE DETERMINATION OF SAFETY (1976) .. 7
Gary E. Marchant, *Turning Two Blind Eyes: The EPA's Failure to Consider Costs and Health Benefits in Revising the Ozone Standard*, 11 Tul. Envtl. L.J. 261 (1998) 14
THOMAS O. MCGARITY, REINVENTING RATIONALITY (1991) 14

R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983) 12,13,15
NATIONAL ACADEMY OF SCIENCES/NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS (1983) 5,6,7
NATIONAL RESEARCH COUNCIL, UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY (1996) 6,17
Craig N. Oren, *Run Over By* American Trucking *Part I; Can EPA Revive Its Air Quality Standards?*, 29 ENVT'L L. REP. 10,653 (Nov. 1999) 6,14
March Sadowitz & John D. Graham, *A Survey of Residual Cancer Risks Permitted by Health, Safety and Environmental Policy*, 6 RISK 17 (1995) 15
Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999) 14,17
Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COL. L. REV. 1613 (1995) 9,12,14
Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 ECOL. L. Q. 379 (1993) 17
Closure Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Administrator Carol M. Browner (Nov. 30, 1995) (EPA-SAB-CASAC-LTR-96-002) 11
Written Statement of George T. Wolff, Chair, EPA's Clean Air Scientific Advisory Committee's Panels on Ozone and PM, for the House Comm. On Health and Env't, Subcomm. On Oversight and Investigations (Apr. 10, 1997) (1997 WL 10569483) 12

INTEREST OF THE *AMICI*

Amici are professors and scientists with scholarly or professional interests in the intersection of law and science. The various *amici* have taught, researched, and published on issues involving law, science, and policy. Brief summaries of the qualifications and affiliations of the individual *amici* are provided at the end of this brief.

Amici have an interest in seeing that the Court is informed on the appropriate use and limitations of science in setting national ambient air quality standards (NAAQS) under the Clean Air Act. While *amici* support reliance on science to assess the risks of alternative air quality standards, science alone cannot provide a principled justification for setting such standards.

Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. In addition, *amici* take no position on the merits of the specific air quality standards at issue in this case. Rather, their views address the broader question of the role of science in the process by which the U.S. Environmental Protection Agency (EPA) sets air quality standards.[1]

BACKGROUND

The Clean Air Act calls for the EPA Administrator to use her "judgment" to select a primary NAAQS that is "requisite to protect the public health" based on the criteria document and allowing "an adequate margin of safety." 42 U.S.C. §7409(b)(1). The statute also specifies that the criteria document shall "reflect the latest scientific knowledge" about

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no person or entity, other than the individual *amici*, authored this brief in whole or in part, or made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief from all parties have been lodged with the Clerk of the Court pursuant to Rule 37.3.

the public health and welfare[2] effects of the pollutant in question. *Id.* § 7408(a)(2).

At every step in this proceeding, including before this Court, EPA has purported to rely exclusively on scientific factors to justify its selection of revised NAAQS for ozone and particulate matter (PM). Even though EPA appears to acknowledge in its rulemaking preambles that setting air quality standards is a "policy choice,"[3] the only criteria it identifies for making such choices are scientific ones.

In its brief filed in this Court, EPA identified three types of limitations on its NAAQS rulemaking discretion which the Agency argues satisfy the "intelligible principle" requirement. Brief for Petitioner U.S. EPA, No. 99-1257, at 23-24 (July 21, 2000) (hereinafter "EPA Br."). The three limitations are the criteria documents reflecting "the latest scientific knowledge," the advice from the EPA's Clean Air Scientific Advisory Committee (CASAC), and the rulemaking requirements of section 307(d) of the Clean Air Act. The latter "limitation" is procedural only, while the first two factors emphasize scientific inputs.

Likewise, in the NAAQS rulemakings, EPA justified the selection of its NAAQS standards based exclusively on health effects and scientific criteria. For example, EPA claimed to select its ozone standard based solely on "public health policy judgments in addition to determinations of a strictly scientific nature," with assessments of risk playing a "central role in identifying an appropriate level." 62 Fed. Reg. at 38,863 (quotation omitted). The only type of public health "policy

---

[2] Under the Clean Air Act, "welfare" effects refer to non-human biological and physical effects, not monetary measures of impacts as economists use the term.

[3] EPA, Ozone Final Rule, 62 Fed. Reg. 38,856, 38,857 (July 18, 1997); EPA, PM Final Rule, 62 Fed. Reg. 38,652, 38,653 (July 18, 1997).

judgments" that EPA identified were factors such as the nature and severity of health effects, the types of health evidence, the kind and degree of uncertainties involved, and the size and nature of the sensitive populations at risk. *Id.* at 38,883; EPA Br. at 5.

Finally, in testimony to Congress on the proposed ozone and PM NAAQS, EPA's Administrator stated that "[a]s you can see from the description of the process I went through to choose proposed levels on ozone and particulate matter, the focus has been entirely on health, risk, exposure and damage to the environment." Testimony of Carol M. Browner, EPA Administrator, Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Comm. on Government Reform and Oversight (Apr. 23, 1997) (1997 WL 10571215). In defending her selection of the proposed standards to the public, the Administrator reportedly claimed that "I think it is not a question of judgment, I think it is a question of science." *Air Quality Standards: Science-Driven Ozone, PM Proposals Will Be Finished by July 19, EPA Says*, 27 ENV'T REP. (BNA) 2068 (Feb. 14, 1997).

SUMMARY OF ARGUMENT

Throughout this proceeding, EPA has identified no policy or normative criteria to justify its NAAQS standards, thus suggesting that science alone can be used to determine the appropriate air quality standard. Science plays a critical, indeed essential, role in evaluating the risks of possible air quality standards being considered for adoption by EPA. However, science by itself cannot provide the justification for selecting a particular air quality standard. Especially in setting standards for non-threshold pollutants, such as in this case, scientific evidence cannot alone indicate where the standard should be set, since any level above zero will cause some health effects. To provide a principled and consistent basis for justifying the setting of such standards at some level above

zero, EPA must articulate other factors -- whether they be costs or other policy criteria -- to guide its decisions on where to set national ambient air quality standards.

ARGUMENT

As in the proceedings below, EPA's brief filed in this Court identifies no factors or criteria other than scientific evidence to guide its selection of revised primary national ambient air quality standards for ozone and particulate matter. While science[4] is a critical, indeed essential, input in developing standards, science alone cannot provide an "intelligible principle" to guide policy decisions about the level at which to set EPA's revised NAAQS.

I. SCIENCE ALONE CANNOT PROVIDE A BASIS FOR RISK MANAGEMENT DECISIONS

Science has played a prominent and important role in agency regulatory decisions, as well as in judicial review of those decisions. Such reliance on science is justified given the advances that science has made over the past few decades in understanding environmental risks. Yet, purporting to rely solely on science to answer questions science is not designed to address is as misguided as it would be to disregard relevant scientific information. Science plays an appropriate and central role in regulatory agencies' assessments of risk, by providing systematic and reliable knowledge about the world. In contrast, risk management decisions, including decisions on setting health standards, are ones for which science alone cannot provide a principled foundation.

[4] The term "science" as used throughout this brief refers to the natural sciences.

A. Science Describes and Explains

As this Court recently noted, science is "a process for proposing and refining theoretical explanations about the world." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) (citing Brief for American Association for the Advancement of Science et al. as *Amici Curiae* 7-8). As such, science seeks to supply verifiable descriptions of, and explanations about, what *is*, rather than imposing judgments about what *should be*. Science describes, it does not prescribe.

B. Risk Management Prescribes

In the context of health and environmental risks, science plays a critical role in identifying, describing, and quantifying risks, but it does not tell us whether such risks are acceptable or should be reduced. The National Academy of Sciences (NAS) recognized this distinction in its influential 1983 report known as the "Red Book," which established a framework for risk analysis on which regulatory agencies continue to rely today. NATIONAL ACADEMY OF SCIENCES/NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS (1983) ("NAS Red Book").

The NAS distinguished *risk assessment* from *risk management*. It defined risk assessment as "the characterization of the potential adverse health effects of human exposures to environmental hazards." *Id.* at 18. Risk assessment is based on scientific information, supplemented with what have been termed "risk assessment policy" judgments to bridge gaps and uncertainties in the scientific evidence. *Id.* at 37.[5] Risk assessment is considered to be

[5] Such risk assessment policy judgments include factors such as which health effects to consider and to group together, the type of models and assumptions to use in the risk assessment, how to extrapolate data from one small segment of a population to the entire population, and how to compute

(continued...)

predominantly -- though not exclusively[6] – based on scientific evidence and analysis.

Risk management, on the other hand, is "an agency decision-making process that entails consideration of political, social, economic, and engineering information with risk-related information to develop, analyze, and compare regulatory options and to select the appropriate regulatory response to a potential chronic health hazard." NAS Red Book at 18-19. Risk management "necessarily requires the use of value judgments on such issues as the acceptability of risk and the reasonableness of the costs of control." *Id.* at 19.[7] As a subsequent National Research Council report reiterated, "science alone can never be an adequate basis for a risk decision" because "[r]isk decisions are, ultimately, public policy choices."[8] This Court has likewise recognized that the

---

[5] (...continued)
and present uncertainties. NAS Red Book at 29-33. These risk assessment policy judgments are comparable to the "public health policy judgments" that EPA identified as a basis for its NAAQS decisions. *See* 62 Fed. Reg. at 38,883; *supra* pp. 2-3.

[6] *E.g.*, Sheila Jasanoff, *Contested Boundaries in Policy-Relevant Science*, 17 SOC. STUD. SCI. 195, 211 (1987) (noting that analysts have "agreed that very little in a typical risk assessment could be labeled as pure science"); DANIEL M. BYRD III & C. RICHARD COTHERN, INTRODUCTION TO RISK ANALYSIS: A SYSTEMATIC APPROACH TO SCIENCE-BASED DECISION MAKING 6-8, 330-34 (2000) (risk assessment inherently and inevitably involves some judgment).

[7] *See also* Craig N. Oren, *Run Over By* American Trucking *Part I; Can EPA Revive Its Air Quality Standards?*, 29 ENVT'L L. REP. 10,653, 10,660 (Nov. 1999) ("the decision of who should be protected, and what effects they should be protected against, is an ethical decision, not a scientific one").

[8] NATIONAL RESEARCH COUNCIL, UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 26 (1996). This report cautioned against too strict of a separation between risk assessment and risk management, because non-scientific deliberative and policy factors can also be relevant to risk assessment. *Id.* at 34.

setting of health and environmental standards is primarily a policy rather than scientific undertaking.[9]

Risk assessment is therefore understood to be predominantly (but not exclusively) a scientific undertaking, whereas risk management decisions, including the selection of standards, require making value judgments that extend beyond the scope of science.[10] The National Academy recommended that regulatory agencies should "maintain a clear conceptual distinction between assessment of risks and consideration of risk management alternatives; that is, the scientific findings and policy judgments embodied in risk assessments should be explicitly distinguished from the political, economic, and technical considerations that influence the design and choice of regulatory strategies." NAS Red Book at 7.

EPA has endorsed and relied on the NAS's distinction between risk assessment and risk management.[11] For example,

---

[9] In the Court's 1980 review of OSHA's benzene occupational exposure standard, Justice Marshall's dissenting opinion stated: "[W]hen the question involves determination of an acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of the facts." Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 706 (1980). The plurality opinion quoted Justice Marshall's statement, and then responded: "We agree. Thus, while the Agency must support its finding that a certain level of risk exists by substantial evidence, we recognize that its determination that a particular level of risk is 'significant' will be based largely on policy considerations." *Id.* at 655 n.62 (plurality opinion).

[10] *See also* WILLIAM W. LOWRANCE, OF ACCEPTABLE RISK 75-76 (1976) ("Determining safety, then, involves two extremely different kinds of activities... *Measuring risk* - measuring the probability and severity of harm–is an empirical, scientific activity; *Judging safety*– judging the acceptability of risks, is a normative, political activity.").

[11] *E.g.*, EPA, Science Policy Council, *Guidance for Risk Characterization* 2 (Feb. 1995) (available at http://www.epa.gov/ORD/spc/rcguide.htm) ("In

(continued...)

in a recent EPA guidance on conducting risk analysis, EPA directed that agency staff should clearly separate risk assessment from risk management, with risk assessment involving the selection, evaluation and presentation of "scientific information," but not "decisions on the acceptability of any risk level for protecting public health or selecting procedures for reducing risks." EPA, *Risk Characterization Guidance*, *supra* note 11, at 3.

In contrast, EPA noted that risk management decisions should be based on, to the extent permissible, a consideration of "technological feasibility (e.g., treatability, detection limits), economic, social, political, and legal factors," in addition to the output of the risk assessment process. *Id.* According to EPA, "risk assessors and risk managers should understand that the regulatory decision is usually not determined solely by the outcome of the risk assessment." *Id.* In order to make risk assessments "transparent," EPA has further stated that it is important "that conclusions drawn from the science are identified separately from policy judgments and risk management decisions." 63 Fed. Reg. 43,756, 43,769 (Aug. 14, 1998).

3. Agencies Can Use Science as a "Charade"

Notwithstanding broad acceptance that science alone cannot justify judgments about acceptable levels of risk, regulatory agencies such as EPA may find it expedient to cloak policy judgments under the guise of science. Professor Wendy

[11] (...continued)
1984, EPA endorsed these [NAS] distinctions between risk assessment and risk management for Agency use, and later relied on them in developing risk assessment guidelines.") (endnotes omitted) [hereinafter *EPA Risk Characterization Guidance*]; EPA, 61 Fed. Reg. 17,960, 17,960 (Apr. 23, 1996) (citing NAS report in adopting risk assessment guidelines "to ensure that the risk assessment process was maintained as a scientific effort separate from risk management.").

Wagner has dubbed this practice a "science charade," which occurs when "agencies exaggerate the contributions made by science in setting [environmental] standards in order to avoid accountability for the underlying policy decision."[12]

Professor Wagner identified several political, legal and institutional incentives for agencies to engage in the science charade by exaggerating the role and capability of science in making environmental decisions. *Id.* at 1650-73. For example, the strong deference that reviewing courts give EPA's scientific determinations creates "strong and virtually inescapable incentives to conceal policy choices under the cover of scientific judgments and citations." *Id.* at 1663. Professor Wagner identified previous NAAQS rulemakings as examples of a science charade. *Id.* at 1640-44.

II. SCIENCE ALONE CANNOT PROVIDE A BASIS FOR THE OZONE AND PM NAAQS

Science is central to evaluating the health risks of possible alternative air quality standards, but the decision of which standard to adopt is a risk management determination. As such, standard-setting should utilize all the available scientific evidence on health effects, but also needs to incorporate policy considerations. Scientific data on ozone and particulate matter do not and cannot, without more, provide a principled justification for the level at which the respective NAAQS are set.[13]

[12] Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COL. L. REV. 1613, 1617 (1995).

[13] *See* Congressional Testimony of John D. Graham, Director of Harvard Center for Risk Analysis, on Clean Air Act Reauthorization (Oct. 14, 1999) (1999 WL 27595650) ("scientific information (alone) does not typically provide an intelligible basis for the setting of safe (yet non-zero) amounts of air pollution.").

A. Science Alone Cannot Guide Standard-Setting for Non-Threshold Air Pollutants

The scientific data for ozone and PM indicate a continuum of health effects down to background (or natural) concentrations of the pollutant in the air, at which point the health effects associated with the pollutants cannot be distinguished from effects caused by other factors. There appears to be no clear demarcation of a discrete threshold below which a standard could be set to avoid all health effects.[14] EPA acknowledges that there is probably no threshold level for ozone below which no health effects would be expected to occur:

> The Administrator's decision to propose the level of an 8-hour primary O_3 standard at 0.08 ppm ... necessarily reflected a recognition ... that it is likely that O_3 may elicit a continuum of biological responses down to background concentrations.... Thus, in the absence of any discernable threshold, it is not possible to select a level below which absolutely no effects are likely to occur. Nor does it seem possible, in the Administrator's judgment, to identify a level at which it can be concluded with confidence that no "adverse" effects are likely to occur.

62 Fed. Reg. at 38,863 (citation omitted). EPA further acknowledged that "no standard within the range of levels and forms considered in this review, including the selected standard

---

[14] Science can provide a distinct starting point for standard-setting for a pollutant for which the scientific evidence indicates a threshold in the exposure-response relationship, although the decision to set the standard at or below the threshold is itself a policy rather than scientific determination. In such cases, the Administrator can focus on how far below the threshold to set the standard to achieve an "adequate margin of safety," which also is a policy decision.

is risk-free, due to the continuum of risk likely posed by exposures to ambient O_3 potentially down to background levels." *Id.* at 38,873.[15]

Given a continuum of health effects, science provides information on the frequency and severity of adverse effects at various levels, but this information by itself does not identify the level at which to set the standard. For non-threshold pollutants, the only standard that could conceivably protect against all health effects would be a standard set at the level of zero, an option that EPA has explicitly ruled out. *E.g.*, 62 Fed. Reg. at 38,863 ("a zero-risk standard is neither possible nor required by the Act").

EPA's own Clean Air Scientific Advisory Committee concluded with respect to ozone that "there is no bright line which distinguishes any of the proposed standards (either the level or the number of allowable exceedences) as being significantly more protective of health" and "[c]onsequently, the selection of a specific level and number of allowable exceedences is a *policy* judgment."[16] In testimony to Congress, the Chair of CASAC reiterated that "the decisions to select a given level or number of allowable exceedences within their proposed ranges cannot be based on science;" rather, the

---

[15] *See also id.* at 38,867 ("Clearly, for pollutants, such as O_3, that have no discernable thresholds for health effects, no standard can be risk-free."). With respect to particulate matter, EPA similarly noted that "the single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur." 62 Fed. Reg. at 38,656. The Agency also recognized that the alternative PM standards it considered "will not be risk-free." *Id.*

[16] Closure Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Administrator Carol M. Browner (Nov. 30, 1995), at 3 (EPA-SAB-CASAC-LTR-96-002) (emphasis added).

selection of a particular standard is "strictly a policy judgment."[17]

B. EPA's Exclusive Reliance on Science to Justify its Standards Creates the Appearance of a "Charade"

In its brief filed in this Court, as well as in the proceedings below, EPA has defended its selection of its revised ozone and PM NAAQS based solely on scientific grounds. *See* pp. 2-3, *supra*. In addition, EPA suggests that this Court should be highly deferential to its selection of NAAQS standards precisely because it is a "scientific determination."[18] EPA's justification for its NAAQS standards appears to fit the pattern of what has been called a "science charade," in which an agency attempts to use science to justify its standards, even though the level and form of the standards is not something that science alone can determine.

Scholars have suggested that EPA has not been forthright in justifying its selection of current and past NAAQS standards based solely on science, when the selection of such a standard necessarily depends on risk management value judgments.[19]

---

[17] Written Statement of George T. Wolff, Chair, EPA's Clean Air Scientific Advisory Committee's Panels on Ozone and PM, for the House Comm. on Health and Env't, Subcomm. on Oversight and Investigations (Apr. 10, 1997) (1997 WL 10569483).

[18] EPA Br. at 27 ("When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.") (quoting Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983)).

[19] Wagner, *supra* note 12, at 1640-44 (EPA's reliance on scientific and medical evidence alone to justify its previous ozone NAAQS is a "vivid illustration" of an "intentional science charade"); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 261 (1983) ("There is, in short, no simple answer to the question of how the EPA sets air quality standards. Medical evidence cannot offer definitive guidance.... The EPA itself has refused to deal with the problem in a (continued...)

Professor David Faigman, for example, has recently argued that the "real loser in the PM/ozone drama was candor":

> The debate was phrased almost entirely in terms of science when the science played a decidedly minor role in the actual decision.... Science should not be used to hide what are essentially the true bases for decision.[20]

Amici do not purport to know the "true bases" of EPA's selection of its NAAQS, only that science alone cannot provide a consistent and principled basis for its standard-setting.

EPA claims to exclude, for example, considerations of costs and feasibility in setting air quality standards. However, as Professor Joseph Feller, a former EPA attorney, has written, "[i]f all costs are truly ignored, then no risk would be acceptable."[21] Scholars and commentators from a diverse range of viewpoints have argued that EPA does consider costs in setting its air quality standards, even though it excludes consideration of costs in its public justification for its standards.[22] Dr. John Graham, Director of the Harvard Center

---

[19] (...continued)
forthright manner, hiding its policy choices behind its interpretation of scientific evidence."); Graham, *supra* note 13 ("When multi-billion dollar rulemaking decisions are made, it is inevitable that regulators will consider the consequences of their actions as well as the reasonableness of the relationship between risks, benefits and costs.").

[20] DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUES OF SCIENCE IN THE LAW 187 (1999).

[21] Joseph M. Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 ENVTL. LAW 821, 833 (1994).

[22] *E.g.*, FAIGMAN, *supra* note 13, at 183 ("In practice, therefore, despite the legal technicality limiting EPA to promulgating regulations solely to promote health, costs are an integral part of the policy-making process at EPA."); MELNICK, *supra* note 12, at 297 ("[R]egulators inevitably consider cost [in setting air quality standards]. But presently they cannot explain (continued...)

for Risk Analysis, has further argued that EPA's "legal fiction" that it does not consider costs when setting NAAQS is "dysfunctional" because "it (1) reduces political accountability for value judgments and political choices, [and] (2) hides from public scrutiny claims that are made about risks, benefits and costs (since such claims are driven 'underground' in the course of regulatory deliberations)." Graham, *supra* note 13.

EPA's exclusive reliance on science to justify its standard selection thus creates the appearance that the Agency is using science to shield its decision-making from scrutiny. *See* Wagner, *supra* note 12, at 1656 (agencies may be able to find refuge from controversial public debates by relying on the

---

[22] (...continued)
how they do."); MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 238 (1990) ("[I]n the absence of any threshold for risk, some balancing between costs and benefits had to be implicit in the standard setting decision – a reality EPA neither acknowledged nor forced the Congress to confront."); George Eads, *The Confusion of Goals and Instruments: The Explicit Consideration of Cost in Setting National Ambient Air Quality Standards*, in MARY GIBSON (ed.), TO BREATHE FREELY: RISK, CONSENT, AND AIR 222, 229 (1985) (it is a "policy fiction" that costs are not considered in setting NAAQS); Oren, *supra* note 7, at 10,662 ("EPA inevitably must therefore consider costs in standard-setting to help decide how stringent to make the standards."); THOMAS O. MCGARITY, REINVENTING RATIONALITY 253 (1991) ("The institution has considered costs and benefits, and the advice that the Administrator receives orally from subordinates reflects those considerations."); Gary E. Marchant, *Turning Two Blind Eyes: The EPA's Failure to Consider Costs and Health Benefits in Revising the Ozone Standard*, 11 Tul. Envtl. L.J. 261, 267-68 (1998) (EPA failed "to 'come clean' about the true nature of its decision-making"); C. Boyden Gray, *The Clean Air Act Under Regulatory Reform*, 11 TUL. ENVTL. L. J. 235, 235 (1998) ("The plain fact is that the EPA has for a long time considered costs and benefits in setting ambient standards–only it has done so behind closed doors...."); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 317-318 (1999) ("Only insiders know for certain whether EPA does in fact consider costs in issuing national ambient air quality standards," but evidence suggests that "costs do matter in the context of standard-setting for nonthreshold pollutants.").

science charade); MELNICK, *supra* note 12, at 297 ("Far from opening agency decisionmaking to public view, the courts have allowed and encouraged the EPA to sustain a myth and to keep secret its bureaucratic motives."). More significantly, such reliance prevents the Agency from including the careful and open consideration of relevant policy considerations in its justification for its air quality standards.

III. PRINCIPLED STANDARD-SETTING REQUIRES CONSIDERATION OF MORE THAN SCIENCE

The EPA has available to it several alternative approaches by which it could incorporate policy considerations into the reasons it provides for setting and revising NAAQS. Such alternative approaches have been relied upon by the EPA and other agencies in other contexts and have been endorsed in the risk management literature. By adopting one or more of these approaches and openly addressing the policy choices reflected in each, EPA can provide a more principled and consistent explanation for its air quality standards.

The Agency could begin by establishing an acceptable risk level as its core policy criterion. For example, EPA has defined "acceptable risk" for hazardous air pollutants based on a maximum individual mortality risk of no greater than 1 in 10 thousand. 54 Fed. Reg. 38,044 (Sept. 14, 1989). The agency has similarly set acceptable risk levels to guide its decision making under other statutes.[23] To be sure, extending this "acceptable risk" approach to NAAQS will be complicated by the diverse range of types and severity of health effects

---

[23] The Agency has defined acceptable risk targets under the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide & Rodenticide Act, and the Safe Drinking Water Act. *See generally* March Sadowitz & John D. Graham, *A Survey of Residual Cancer Risks Permitted by Health, Safety and Environmental Policy*, 6 RISK 17 (1995).

attributed to ozone or PM exposure. Moreover, using such an approach would mean that the acceptable risk level would become the standard no matter what the costs of achieving it. Nevertheless, if the Agency chose to pursue such an approach in order to establish an intelligible principle for setting air quality standards, it could then apply its acceptable risk criterion to select the least burdensome standard that results in an acceptable level of risk.[24]

Alternatively, the Agency could find a principle for standard-setting in the comparison of the adverse health and environmental effects of pollutants to any countervailing, beneficial effects of those pollutants (such as screening out harmful ultraviolet radiation).[25] The Agency would thereby select a level that minimizes overall risk. In such instances of risk-risk tradeoffs, the Agency would combine scientific information about risk with policy judgment about how best to resolve the tradeoff. *See generally* JOHN D. GRAHAM & JONATHAN B. WIENER, RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (1995).

Another option is for the Agency to consider the full range of costs, beyond countervailing health risks, that can be anticipated to arise from a proposed standard. The Agency could use these broader estimates of costs to balance against estimated benefits in determining the level at which to set a standard. As already noted, it may be that EPA already tacitly

---

[24] Comparative risk analysis may also be helpful in deciding acceptable risk levels, in which the Agency would compare ozone or PM risks to similar risks from other causes. *See generally* J. CLARENCE DAVIES, COMPARING ENVIRONMENTAL RISKS (1996).

[25] The Court of Appeals found that EPA had failed to consider such risk-risk tradeoffs in setting its ozone standards. American Trucking Associations, Inc. v. U.S. Environmental Protection Agency, 175 F. 3d 1027, 1052 (D.C. Cir. 1999). Because it did not seek review of that holding by this Court, EPA is required to consider such risk-risk tradeoffs on remand.

takes costs or feasibility considerations into account. By openly incorporating the use of economic analysis into its decision making, the EPA could provide a consistent basis for setting particular air quality standards. As a group of distinguished economists has collectively noted, "[t]he estimation of benefits and costs of a proposed regulation can provide illuminating evidence for a decision, even if precision cannot be achieved."[26] In the case of non-threshold pollutants, consideration of costs would not only be illuminating but also is probably inevitable.[27] Open deliberation of both benefits and costs by the Agency would provide a principled basis for setting air quality standards.[28]

Finally, as with costs, the Agency could incorporate into its decision-making explicit and detailed considerations of issues of equity. It would be relevant to risk management decisions for the Agency to consider how the effects of alternative standards may be distributed within society, such as whether health risks are differentially distributed across different racial and socio-economic groups.[29]

---

[26] Kenneth J. Arrow, Maureen L. Cropper, George C. Eads, Robert W. Hahn, Lester B. Lave, Roger G. Noll, Paul R. Portney, Milton Russell, Richard Schmalensee, V. Kerry Smith, and Robert N. Stavins, *Is There a Role for Benefit-Cost Analysis in Environmental, Health, and Safety Regulation?*, 272 SCIENCE 221(1996).

[27] Sunstein, *supra* note 22, at 378 ("The problem is that it is impossible to assess 'safety' in a cost vacuum. In general cost-benefit analysis should be followed, acknowledging that it will raise some hard questions of value.")

[28] *See* Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 ECOL. L. Q. 379 (1993).

[29] NATIONAL RESEARCH COUNCIL, UNDERSTANDING RISK, supra note 6, at 40 (noting that "[f]or some interested and affected parties in risk decisions, managing environmental risks has become a question of fairness, moral responsibility, and distributional equity.")

EPA's current approach, purporting to rely exclusively on scientific evidence of adverse health effects, has precluded it from openly adopting alternative approaches that would provide a more reasoned basis for guiding its policy judgment. As with any risk management decision, to justify air quality standards in a principled manner the EPA should expressly consider policy criteria such as acceptable risk, costs, risk-risk tradeoffs, or equity in addition to all the available science.

CONCLUSION

The lower court's conclusion that EPA "offers no intelligible principle by which to identify a stopping point" (175 F.3d at 1037) is well supported by an understanding of the appropriate role that science is able to play in risk management decision making. While science can identify the level and severity of the health effects from different levels of exposure to ozone or PM in various populations, science alone cannot establish what is acceptable for society.

Respectfully submitted,

GARY E. MARCHANT
Center for the Study of Law, Science and Technology
Arizona State University College of Law
P.O. Box 877906
Tempe, AZ 85257-7906
(480) 965-3246

CARY COGLIANESE
Counsel of Record
Harvard University
John F. Kennedy School of Government
79 John F. Kennedy Street
Cambridge, MA 02138
(617) 495-1402

SEPTEMBER 11, 2000

APPENDIX

IDENTIFICATION OF *AMICI*

GARY E. MARCHANT is Associate Professor of Law at Arizona State University School of Law, and a Faculty Fellow at the Center for the Study of Law, Science and Technology at the same institution. His academic degrees include a J.D. from Harvard in 1990, an M.P.P from the Kennedy School of Government in 1990, and a Ph.D. in Genetics from the University of British Columbia in 1986. His research and teaching interests include Environmental Law, Risk Assessment and Management, Genetics and the Law, and Law, Science, and Technology.

CARY COGLIANESE is Associate Professor of Public Policy at Harvard University's John F. Kennedy School of Government. He received his J.D., M.P.P. (public policy), and Ph.D. in political science from the University of Michigan. His interdisciplinary research in administrative and environmental law explores the impact of procedural design and judicial review on the regulatory process. He teaches in the areas of law, regulatory policy, and ethics.

DANIEL M. BYRD III received both B.A. (1964) and Ph.D. (1971) degrees from Yale University. Since 1988, Dr. Byrd has directed Consultants in Toxicology, Risk Assessment and Product Safety (CTRAPS), a scientific support firm that helps clients acquire, interpret, and use biomedical information. Previously, he conducted independent research into mechanisms of chemotherapeutic drugs at Roswell Park Memorial Institute and at the University of Oklahoma. He subsequently held positions in the Office of Chemical Control, the Office of Pesticide Programs, the Carcinogen Assessment Group, and the Science Advisory Board (SAB) at the U.S. Environmental Protection Agency (EPA).

GAIL CHARNLEY is an internationally recognized expert in environmental health risk assessment and risk management science and policy. Dr. Charnley has over 20 years of experience in environmental toxicology, human health risk assessment, and risk management. During its tenure, she was executive director of the Presidential/Congressional Commission on Risk Assessment and

Risk Management, mandated by Congress to evaluate the role that risk assessment and risk management play in federal regulatory programs. She is immediate past-president of the international Society for Risk Analysis and holds an adjunct faculty position at the Harvard Center for Risk Analysis.

MAUREEN L. CROPPER is a Professor of Economics at the University of Maryland, a Lead Economist at the World Bank and a University Fellow at Resources for the Future. She is past president of the Association of Environmental and Resource Economists and chairs the Advisory Council on Clean Air Compliance Analysis, a subcommittee of EPA's Science Advisory Board. Most of Dr. Cropper's research has dealt with valuing environmental amenities, especially environmental health effects, both from an empirical and a theoretical perspective. Her current research deals with valuing the health impacts of pollution in developing countries and with the economics of deforestation.

E. DONALD ELLIOTT is Professor (Adjunct) of Law at Yale Law School and Georgetown University Law Center, and a Partner in the Washington, D.C. office of Paul, Hastings, Janofsky & Walker. He is a former Assistant Administrator and General Counsel of the U.S. Environmental Protection Agency from 1989-1991, and was previously the Julien and Virginia Cornell Professor of Environmental Law and Litigation at Yale Law School. His research interests are in Law and Science, Environmental Law, and Administrative Law. He is Advisor on Law and Science to the Carnegie Commission on Science, Technology and Government, the Federal Courts Study Committee and the Federal Judicial Center.

DAVID L. FAIGMAN is a Professor of Law at the University of California, Hastings College of Law. He writes extensively on subjects related to the law's use of science. He is a coauthor/coeditor of the three volume work *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West Group, 1997, 2000 Supp.) (with David H. Kaye, Michael J. Saks and Joseph Sanders). He is also the author of the recently published book, *Legal Alchemy: The Use and Misuse of Science in the Law* (W.H. Freeman & Co. 1999).

JAMES K. HAMMITT is Associate Professor of Economics and Decision Sciences at Harvard University. His research concerns the

development and application of quantitative methods -- including benefit-cost, decision, and risk analysis, game theory, and mathematical modeling -- to health and environmental policy. His current research topics include the management of long-term environmental issues with important scientific uncertainties, such as global climate change and stratospheric-ozone depletion, the evaluation of ancillary benefits and countervailing risks associated with risk-control measures, and the characterization of social preferences over health and environmental risks using revealed-preference and contingent-valuation methods. He received his Ph.D. in 1988 from Harvard University.

JAMES E. KRIER is Earl Warren DeLano Professor of Law at the University of Michigan Law School. He has taught and written in the field of environmental law for thirty years. He is the author of *Environmental Law and Policy* (1971), with a second edition published in 1978 (with Richard Stewart). He is also the co-author (with Ursin) of *Pollution and Policy* (University of California Press 1977).

WILLIAM HENRY LASH, III is Professor of Law at George Mason University School of Law, and Distinguished Senior Fellow at the Center for the Study of American Business, Washington University. He is also an Adjunct Fellow at Citizens for a Sound Economy and Visiting Professor of Law, Boston College School of Law. He has testified before Congressional committees, spoken before industry and business associations, and written on the limits of EPA regulatory authority and the law and economics of climate change.

ROGER O. McCLELLAN is President Emeritus of the Chemical Industry Institute of Toxicology, having served as President of the Institute from 1988 through 1999, and is an Adjunct Professor at Duke University, University of North Carolina at Chapel Hill, North Carolina State University, University of New Mexico, and Washington State University. Dr. McClellan has served as past Chairman of EPA's Clean Air Scientific Advisory Committee, is a member of the Executive Committee of EPA's Science Advisory Board, has served on several past and current committees of the National Academy of Sciences/National Research Council, and has served in an advisory role to numerous other governmental and private organizations on toxicology issues. He has received

numerous honors, including election to membership in the Institute of Medicine of the National Academy of Sciences.

THOMAS W. MERRILL is Professor of Law, Northwestern University School of Law. He was formerly a Deputy Solicitor General (1987-1990) of the United States. His academic interests are centered on Administrative Law but also include Environmental Law and Constitutional Law.

LARS NOAH is a Professor of Law at the University of Florida. His scholarly work has focused on questions of law and medicine, administrative procedure, and products liability, and he has done work for the National Institutes of Health and National Academy of Sciences (Institute of Medicine).

JOYCE E. PENNER is a Professor in the Department of Atmospheric, Oceanic, and Space Sciences at the University of Michigan, Ann Arbor, and is Director of the Laboratory for Atmospheric Science and Environmental Research. She has ongoing research relating to improving climate models through the addition of interactive chemistry and the description of aerosols and their direct and indirect effects on the radiation balance in climate models. These models run in both a parallel computing environment and vector supercomputers. She has an ongoing interest in urban, regional and global tropospheric chemistry and budgets, cloud and aerosol interactions and cloud microphysics, climate and climate change, model development and interpretation.

ROBERT PHALEN is a Professor of Community and Environmental Medicine at the College of Medicine of the University of California, Irvine, CA. He is also the Director of the Air Pollution Health Effects Laboratory at the University of California, Irvine.

JEFFREY J. RACHLINSKI is Professor of Law at Cornell Law School. His academic degrees include a B.A./M.A. in Psychology from the Johns Hopkins University (1988), a J.D. from Stanford Law School (1993), and a Ph.D. in Psychology from Stanford University (1994). Dr. Rachlinski was a National Science Foundation Graduate Fellow in psychology at Stanford University from 1989 to 1993, and a visiting associate professor at the University of Chicago Law School in the spring of 1999. His research interests primarily

involve the application of cognitive and social psychology to law, but also include some aspects of Environmental Law.

JOSEPH SANDERS is A.A. White Professor of Law at the University of Houston. He earned both a J.D. and a Ph.D. in sociology from Northwestern University. His research and writing interests include mass torts and scientific evidence. He is the author of *Bendectin on Trial* (1998) and is a co-editor of *Modern Scientific Evidence* (1997).

ROBERT N. STAVINS is the Albert Pratt Professor of Business and Government, and Faculty Chair of the Environment and Natural Resources Program at the John F. Kennedy School of Government, Harvard University. He is a University Fellow of Resources for the Future, the Chairman of the Environmental Economics Advisory Committee of the U.S. Environmental Protection Agency's Science Advisory Board, and a Member of EPA's Clean Air Act Advisory Committee, the Intergovernmental Panel on Climate Change, and the editorial boards of several scholarly journals. He directed Project 88, a bi-partisan effort co-chaired by former Senator Timothy Wirth and the late Senator John Heinz, to develop innovative approaches to environmental and resource problems. Prior to coming to Harvard, he was a staff economist at the Environmental Defense Fund.

JONATHAN B. WIENER is Professor at the Law School and at the Nicholas School of the Environment, Duke University, where he writes and teaches on issues of environmental law and risk regulation. In 1999 he was a visiting professor at Harvard Law School. His writing includes *Risk vs. Risk* (1995) (with John Graham) and "Managing the Iatrogenic Risks of Risk Management," 9 *Risk* 39-82 (1998). He has served as President of the Society for Risk Analysis, Research Triangle Chapter, and as a senior aide in the President's Council of Economic Advisers (CEA), the Office of Science & Technology Policy (OSTP), and the Department of Justice, in both the Clinton and Bush administrations. He clerked for Judge Jack B. Weinstein, U.S. District Court, EDNY, and for Judge Stephen G. Breyer, U.S. Court of Appeals for the First Circuit, after graduating from college and law school at Harvard.

JAMES D. WILSON is Senior Fellow and leader of the risk analysis program in the Center for Risk Management at Resources for the Future. An organic chemist by training, he spent twenty-nine years with the Monsanto Company, in research, research management and then health and environmental policy. His research has focused on structure-activity relationships, including environmental chemistry broadly, "dioxin" and related chemicals, relation of chemical structure to physical and physiological properties, the use of science in decision making, and the influence of organizational structure on decision making. His current research at RFF concerns the development and use of standardized risk assessment practices, particularly default options. He was President of the Society for Risk Analysis in 1993 and was named a Fellow of the Society in that year. He holds an A.B. from Harvard and a Ph.D. (organic chemistry) from the University of Washington.

82
Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

No. 99-1257

In The

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

WILLIAM H. MELLOR*
CLINT BOLICK
DEBORAH SIMPSON
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
(202) 955-1300

ROGER PILON
TIMOTHY LYNCH
ROBERT A. LEVY
RONALD D. ROTUNDA
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 842-0200
**Counsel of Record*

BEST AVAILABLE COPY

37pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

I. THIS COURT SHOULD MEANINGFULLY ENFORCE THE NONDELEGATION DOCTRINE 4

II. SECTION 109(B)(1) OF THE CLEAN AIR ACT FAILS TO PROVIDE AN INTELLIGIBLE PRINCIPLE BY WHICH TO SET AIR QUALITY STANDARDS FOR NON-THRESHOLD POLLUTANTS 13

A. Congress Has Knowingly Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants 14

1. The Clean Air Amendments of 1970... 14

2. The Clean Air Amendments of 1977... 18

B. EPA's Attempts to Set NAAQS Demonstrate that Congress Has Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants 22

III. THIS COURT SHOULD HOLD SECTION 109(B)(1) UNCONSTITUTIONAL AS APPLIED TO NON-THRESHOLD POLLUTANTS 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 11

American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) 4, 21, 28

American Trucking Associations, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) 28

Arizona v. California, 373 U.S. 546 (1963) 13

Bowsher v. Synar, 478 U.S. 714 (1986) 5, 6

Buckley v. Valeo, 424 U.S. 1 (1976) 4, 6, 8

Buttfield v. Stranahan, 192 U.S. 470 (1904) 10

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 28

Clinton v. City of New York, 524 U.S. 417 (1998) .. 5, 6, 7

Field v. Clark, 143 U.S. 649 (1892) 9, 10

Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) 11, 12, 13, 26, 30

INS v. Chadha, 462 U.S. 919 (1983) 5

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 10, 11, 12, 13

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 10

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 5

TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) 12

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 12

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 5

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 11

Union Bridge Co. v. United States, 204 U.S. 364 (1907) 10

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 9

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 9

Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) 8

Yakus v. United States, 321 U.S. 414 (1944) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1 5

U.S. Const. art. II, § 1 5

U.S. Const. art. III, § 1 5

CODES AND STATUTES

7 U.S.C. § 136(bb) 27

7 U.S.C. § 136a(c)(5)(D) 27

33 U.S.C. § 1311(b)(1)(A) 27

33 U.S.C. § 1314(b)(1) 27

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 300g-1(b)(4)(D) 27

42 U.S.C. §§ 7401-7671 14

42 U.S.C. § 7408(a)(1) 15

42 U.S.C. § 7409 15

42 U.S.C. § 7409(b)(1) 2, 3, 14, 15

42 U.S.C. § 7409(b)(2) 15

42 U.S.C. § 7409(d) 15

47 U.S.C. § 309(a) 29

MISCELLANEOUS

43 Fed. Reg. 46,246 (1978) 16, 23, 24

50 Fed. Reg. 25,532 (1985) 23

50 Fed. Reg. 37,484 (1985) 23

53 Fed. Reg. 14,926 (1988) 23

62 Fed. Reg. 38,652 (1997) 23

62 Fed. Reg. 38,856 (1997) 23, 24

Air Quality Management Division, U.S. EPA, *Review of the National Ambient Air Quality Standards for Lead: Assessment of Scientific and Technical Information* (1989) 23

Ambient Air Quality Standards for Particulate Matter and Ozone: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. (1997) 22

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 47 (C. Rossiter ed., 1961) 7, 8

Joseph Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 Envtl. L. 821 (1994) ... 16, 24, 25

Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York: *More Than "a Dime's Worth of Difference"*, 49 Cath. U. L. Rev. 337 (2000) 8

Mark K. Landy, et al., *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* (1994) 23

Legislative History of the Clean Air Amendments of 1970, Vol. I 17, 18

Legislative History of the Clean Air Amendments of 1970, Vol. II 16

Legislative History of the Clean Air Amendments of 1977, Vol. III 17, 20

Legislative History of the Clean Air Amendments of 1977, Vol. IV 19, 20, 22

Legislative History of the Clean Air Amendments of 1977, Vol. VII 20

John Locke, *Second Treatise of Government, in the Tradition of Freedom*, 244 (M. Mayer ed., 1957) 7

Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standards*, 31 Envtl. Sci. & Tech. 142A (1997) 21

TABLE OF AUTHORITIES – Continued

Page

Joseph V. Rodricks, et al., *Significant Risk Decisions in Federal Regulatory Agencies*, 7 Regulatory Toxicology and Pharmacology 307 (1987) 27

David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985) 9, 26

Senate Committee on Public Works, 93rd Cong., 2d Sess., Coordinating Comm. on Air Quality Studies, Nat'l Academy of Sciences, Air Quality and Automobile Emission Control (Comm. Print 1974) 18

Cass Sunstein, *Is The Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303 (1999) 16, 24, 26

Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995) 25

INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Toward that end, the Institute seeks to reinvigorate those founding principles, such as the separation of powers, crucial to the preservation of freedom.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, including the idea that the U.S. Constitution separates power among three coordinate branches of the federal government in order to preserve citizens' liberty. The instant case squarely addresses the limits on the power of Congress to delegate its power to executive agencies and thus is of central interest to Cato and the Center.

---

[1] In conformity with Supreme Court Rule 37, *amici* have obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. *Amici* also state that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amici*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Section 109(b)(1) of the Clean Air Act, 42 U.S.C. § 7409(b)(1), is unconstitutional as applied to non-threshold pollutants because the statute provides no intelligible principle by which the Environmental Protection Agency (EPA) is to set National Ambient Air Quality Standards (NAAQS) for such pollutants.

In order to preserve the liberty of the American people, the Constitution's Framers separated power among three coordinate branches of the federal government. Implicit in this structure is the idea that the political branches may not reallocate authority among themselves as they see fit. Accordingly, this Court has long recognized that Congress may not freely delegate the legislative powers vested in it by the Constitution.

In order to enforce what is known as the nondelegation doctrine, this Court has held that Congress must provide executive agencies or others with an intelligible principle to govern the exercise of delegated authority. But unfortunately, in a series of precedents over the last 60 years, this Court has refused to meaningfully enforce this important constitutional requirement. Instead, it has allowed Congress to avoid its responsibility to make difficult policy choices, thereby impairing the separation of powers and diminishing individual liberty. The instant case, however, presents this Court with an appropriate opportunity to breathe life into the intelligible principle test once again.

When Congress passed the Clean Air Amendments of 1970, it assumed that those air pollutants falling under

the ambit of Section 109 were threshold pollutants, meaning that there was a concentration level above which those pollutants were a threat to health and below which they were not. It thus directed EPA to establish primary air quality standards below the threshold concentration for adverse health effects, mandating that such standards be "requisite to protect the public health" with "an adequate margin for safety." 42 U.S.C. § 7409(b)(1).

It soon became clear, however, that many, if not all, Section 109 pollutants were actually non-threshold pollutants, meaning that adverse health impacts occurred at *any concentration level above zero*. While Congress recognized this reality at the time that it passed the Clean Air Amendments of 1977 and clearly indicated that it did not want the NAAQS for non-threshold pollutants set at zero, it nonetheless failed to set forth a new intelligible principle. As a result, the principle by which EPA is directed to set air quality standards for non-threshold pollutants is not only unintelligible but it is nonsensical, as it is impossible for EPA to set standards that "protect the public health" with an "adequate margin for safety."

The statute as currently written requires EPA to engage in an entirely arbitrary exercise of determining a degree of adverse health effects that is acceptable, an inquiry for which the Clean Air Act provides no guidance. Therefore, in a matter with enormous impact on both the health of the American people and the vitality of the nation's economy, Congress has abdicated its constitutional responsibility to make a fundamental policy choice. Although it easily could have provided an intelligible principle to cabin EPA's discretion, Congress has

instead impermissibly delegated its legislative power to the agency.

While the D.C. Circuit correctly ruled below that EPA's construction of Section 109(b)(1) in its ozone and particulate matter (PM) rules effectuated an unconstitutional delegation of power, its decision to allow EPA "an opportunity to extract a determinate standard on its own"[2] was inappropriate. The nondelegation doctrine does not permit an agency to supply its own intelligible principle where none is present in the statute. The point of the nondelegation doctrine is not that *agencies must provide rational explanations* for their behavior, but that *Congress must set forth an intelligible principle* to guide agency discretion. As Congress has failed to do so here, this Court should declare Section 109(b)(1) to be unconstitutional as applied to non-threshold pollutants.

I. THIS COURT SHOULD MEANINGFULLY ENFORCE THE NONDELEGATION DOCTRINE.

The separation of powers plays a crucial role in our constitutional framework. As this Court has noted, "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Although many aspects of the Constitution are premised on the importance of checks and balances, central to the Framers' design was the distribution of the

[2] *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

federal government's power among three coordinate branches, with legislative powers vested in Congress, executive powers vested in the President, and judicial powers vested in this Court as well as such inferior courts as Congress would establish. See U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

This arrangement is not designed to secure efficiency or to promote administrative convenience; rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.* 501 U.S. 252, 272 (1991).[3] Accordingly, this Court often has rejected efforts by Congress and the President to rearrange power in a manner hostile to our constitutional framework. In no less than six cases over the last 25 years, this Court has struck down congressional enactments as contrary to the constitutionally mandated separation of powers.[4] In these

[3] See also *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured . . . to provide avenues for the operation of checks on the exercise of governmental power").

[4] See *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating Line Item Veto Act); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (invalidating provision of Transfer Act regarding composition of Metropolitan Washington Airports Authority's Board of Review); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating portion of the Gramm-Rudman-Hollings Act); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating "legislative veto" provision of the Immigration and Nationality Act); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50

cases, this Court reached the same conclusion whether Congress had aggressively encroached on another branch's power or had instead chosen to voluntarily cede its own power. Compare *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down attempt by Congress to assign executive powers to officer under its control) with *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating congressional attempt to delegate to the President the power to amend Acts of Congress). This is because the separation of powers is not designed to safeguard the interests of those occupying public office; rather, its purpose is to protect the liberty of the American people.

In *Clinton v. City of New York*, Justice Kennedy explained why this Court must not allow a branch of government to voluntarily relinquish the powers vested in it by the Constitution:

> To say the political branches have a somewhat free hand to reallocate their own authority would seem to require the acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. *Liberty is always at stake when one or more branches seek to transgress the separation of powers.*

(1982) (invalidating Bankruptcy Act's delegation of authority to Article I courts); *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating composition of the Federal Election Commission as established by the Federal Election Campaign Act of 1971).

524 U.S. at 449-50 (Kennedy, J., concurring) (citations omitted) (emphasis added).[5]

It has long been established, therefore, that Congress may not freely delegate its legislative powers. This principle, commonly referred to as the nondelegation doctrine, traces its roots back to two of Europe's most distinguished and influential political philosophers. John Locke, writing in 1690, stated that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."[6] Locke pointed out that the power vested by the people in the legislature was "only to make laws, and not to make legislators."[7] Montesquieu, furthermore, warned of the dangers that would result from allowing legislative and executive powers to be joined together: "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."[8]

---

[5] Justice Kennedy also observed, "That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (citations omitted).

[6] John Locke, *Second Treatise of Government, in the Tradition of Freedom* 244 (M. Mayer ed., 1957).

[7] *Id.*

[8] *The Federalist* No. 47, at 303 (C. Rossiter ed., 1961) (quoting Montesquieu).

This sentiment had a marked impact on the Framers of the Constitution. James Madison quoted that passage from Montesquieu in *Federalist* No. 47, and, in addition, echoed the French philosopher's view that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[9] This Court has acknowledged the influence of Montesquieu's work as well: "the Constitution was . . . true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct." *Buckley v. Valeo*, 424 U.S. at 120.

It is not surprising, therefore, that the nondelegation doctrine emerged early in this Court's jurisprudence. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825), for example, Chief Justice Marshall wrote, "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." The doctrine, however, did not figure prominently in this Court's nineteenth-century jurisprudence for congressional delegations in that era were few and far between. Those delegations that did take place almost always shared at least one of two common features. First, Congress "legislated in contingency," meaning that it authorized the President to take prescribed action when he ascertained certain facts to be true.[10] And second, almost all such "delegations" arose in those areas

---

[9] *Id.* (quoting Montesquieu).

[10] See, e.g., Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "a Dime's Worth of Difference"*, 49 Cath. U. L. Rev. 337, 342-46 (2000).

of foreign affairs and trade that are closely related to the President's executive power to formulate foreign policy.[11]

In *Field v. Clark*, 143 U.S. 649 (1892), for example, the Court considered the constitutionality of a statute removing tariffs on the importation of certain agricultural goods, but authorizing the President to reimpose tariffs upon goods from any country failing to treat American goods reciprocally. Rejecting a nondelegation doctrine challenge, the Court held that the statute did not empower the President to make law but instead authorized him to find facts in enforcing the trade policy established by Congress. 143 U.S. at 692-93. In so holding, however, this Court strongly reaffirmed the vitality of the nondelegation doctrine: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

Near the end of the century, Congress began to delegate authority more frequently, and as a result more cases involving delegation began to reach this Court. In some of these cases, congressional attempts to relinquish legislative powers were struck down. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter the maritime law"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88 (1921) (holding that the Lever Act, which made it unlawful for any person to charge unreasonable prices

---

[11] See *id.* at 343-346; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1262-63 (1985).

for "necessaries," amounted to a delegation by Congress of legislative power to courts); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (invalidating improper delegation of maritime law to the states). In other cases, delegations were upheld; but in each of these instances, this Court made it clear that delegated authority must be accompanied by adequate congressional guidance. See, e.g., *Union Bridge Co. v. United States*, 204 U.S. 364, 386 (1907) ("[T]he Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power"); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) ("[The Tea Act] does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable").

In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), a case like *Field v. Clark* involving tariff adjustment, this Court attempted to synthesize its nondelegation doctrine precedents. In doing so, it recognized the importance of maintaining the separation of powers, see *id.* at 406 ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President"), while at the same time acknowledging that enforcement of the principle was not susceptible to a bright-line rule if the federal government was to remain capable of effectively exercising its substantive powers. See *id.* ("In determining what [a branch of government] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental co-ordination").

Striking a balance between these countervailing concerns, this Court set forth a new standard for assessing the constitutionality of congressional delegations, explaining that "[i]f Congress shall lay down by legislative act an intelligible principle [to govern the exercise of delegated authority], such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

Implementing the "intelligible principle" test, this Court soon struck down two statutes for failing to set forth adequate standards to guide the conduct of the executive branch. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), it invalidated a section of the National Industrial Recovery Act (NIRA) authorizing the President to prohibit the interstate transportation of petroleum priced in violation of state-imposed production quotas. The Court complained that the statute "left the matter to the President without standard or rule, to be dealt with as he pleased." *Id.* at 418. Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this Court struck down another section of the NIRA, this one empowering the President to establish "codes of fair competition" in certain industries "for the protection of consumers, competitors, employees, and others, in furtherance of the public interest." The Court once again observed that Congress' grant of authority was open-ended, "set[ting] up no standards, aside from the general aims of rehabilitation, correction, and expansion described in section one [of the NIRA]." *Id.* at 541.

In the 65 years since *Schechter*, however, this Court has largely abdicated its responsibility of ensuring that congressional delegations of authority are accompanied by intelligible principles. See *Industrial Union Dep't v.*

American Petroleum Inst., 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring) ("[T]he principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud"). As a result, it has upheld numerous delegations of open-ended authority against nondelegation doctrine challenges. See, e.g., *Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (upholding delegation to Price Administrator of authority to fix "fair" and "equitable" commodities prices); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (affirming FCC's authority to regulate broadcast licensing "as public interest, convenience, or necessity require"). Crucially, though, this Court has never overruled the *J.W. Hampton, Jr., Co.* "intelligible principle" test, ostensibly continuing to apply it even in cases affirming the constitutionality of seemingly unbounded delegated discretion. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Moreover, despite the general trend, various Justices, from time to time, have called for exhuming the nondelegation doctrine from this Court's jurisprudential graveyard.

In *Industrial Union Dep't*, for example, Chief Justice Rehnquist argued in a concurring opinion that a provision of the Occupational Safety and Health Act of 1970 ran afoul of the nondelegation doctrine. In doing so, he identified the important functions served by the doctrine: (1) "ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"; (2) guaranteeing that the recipients of delegated authority are provided with "an 'intelligible principle' to guide the

exercise of the delegated discretion"; and (3) facilitating judicial review of "the exercise of delegated legislative discretion." 448 U.S. at 685-86. See also *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

While each of these functions may appear unrelated to the others, they are not, for each, in its own way, is a manner in which the nondelegation doctrine helps to secure the liberty of the American people. For this reason, liberty is threatened when the nondelegation doctrine, an important component of the separation of powers, is ignored. And it is for this reason that this Court should revitalize the nondelegation doctrine.

II. SECTION 109(B)(1) OF THE CLEAN AIR ACT FAILS TO PROVIDE AN INTELLIGIBLE PRINCIPLE BY WHICH TO SET AIR QUALITY STANDARDS FOR NON-THRESHOLD POLLUTANTS.

The instant case provides this Court with an important opportunity to reinvigorate the nondelegation doctrine by meaningfully applying the intelligible principle test set forth in *J.W. Hampton, Jr., & Co.* As will be shown, Congress' failure to provide an intelligible principle here was neither borne of necessity nor practicality. It instead resulted from a misunderstanding about the effects of air pollutants. And while Congress recognized its mistake over two decades ago, it consciously chose to ignore the conundrum its prior directive had created for EPA, thus abdicating its constitutional responsibility to provide meaningful guidance to the agency.

A. Congress Has Knowingly Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants.

In order to understand why Section 109(b)(1) fails to provide an intelligible principle by which to set air quality standards for non-threshold pollutants, it is necessary to review the history of the provision. When Section 109 was adopted in 1970, Congress assumed that the pollutants covered by the provision had discernible thresholds above which pollution levels threatened health and below which they did not. On this basis, legislators established a regulatory regime based on the intelligible principle that air pollution would be controlled by keeping the level of pollutants below their respective thresholds – "with an adequate margin of safety," 42 U.S.C. § 7409(b)(1). By 1977, however, Congress fully recognized that many Section 109 pollutants had no such thresholds at all. But despite a clear awareness of the nature of these pollutants and an express recognition of the economic and practical infeasibility of banning such pollutants altogether, Congress did not alter the provision, thus depriving EPA of an intelligible principle by which to set air quality standards for non-threshold pollutants.

1. The Clean Air Amendments of 1970

With the passage of the Clean Air Amendments of 1970, Pub. L. No. 91-604 (codified as amended at 42 U.S.C. §§ 7401-7671), Congress initiated a massive effort

to clean the nation's air. The National Ambient Air Quality Standards (NAAQS), 42 U.S.C. § 7409, which are supposed to represent the maximum concentrations of various air pollutants that are compatible with "public health and welfare," are a central component of that effort. The basic rules governing NAAQS are laid out in Sections 108 and 109 of the Clean Air Act. Pursuant to Section 108, EPA develops an "air quality" "criteria document" for "each air pollutant – emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1). Once these criteria documents are reviewed by the Clean Air Scientific Advisory Committee, 42 U.S.C. § 7409(d), EPA promulgates primary and secondary NAAQS for the pollutant, which are also reviewed by the Advisory Committee. The primary NAAQS is set at a level "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The secondary NAAQS is set at a level "requisite to protect the public welfare." 42 U.S.C. § 7409(b)(2).

The legislators' extensive discussion of ambient air quality in 1970 reveals that Congress at that time presumed that all pollutants addressed by Section 109 were "threshold pollutants" – namely pollutants with an identifiable level above which adverse health effects are observed and below which those health effects are absent. Because they believed that every relevant pollutant had a discernible threshold, legislators articulated the following principle by which to set air quality standards: A primary

NAAQS should be set safely below a pollutant's threshold level.

In order to assure that threshold levels for pollutants would not be surpassed, Congress directed EPA to isolate an exact threshold level for each pollutant, and then establish an air quality standard sufficiently below that level so as to avoid adverse health effects with "an adequate margin of safety."[12] See 43 Fed. Reg. 46,246, 46,247 (1978) ("It is clear from section 109 that [EPA] should not attempt to place the standard at a level estimated to be at the threshold for adverse health effects but should set the standard at a lower level in order to provide a margin of safety").

As Representative Rogers explained, "The Secretary . . . will set a national air quality standard for ambient air quality . . . based on criteria, scientific information as to how many parts per million are permissible for particular pollutants." Legislative History of the Clean Air Amendments of 1970 ("Legislative History"), Vol. II, at 819. Rogers, along with his colleagues, however, never conceived of the possibility that *zero* parts per million would be permissible for a particular pollutant. They had complete confidence in the threshold model

---

[12] See Joseph Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 Envtl. L. 821, 823 (1994) ("A critical . . . assumption underlies . . . the structure of the Clean Air Act. . . . The assumption is that, for each pollutant of concern, there is a threshold concentration, represented by the NAAQS, above which the pollutant is a threat to health or welfare and below which it is not"); see also Cass Sunstein, *Is The Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 314 (1999).

because scientists had already identified safe non-zero thresholds for all pollutants studied pursuant to the Air Quality Act of 1967 that were likely to be regulated under Section 109.[13]

The expert testimony of Dr. John T. Middleton, Commissioner of the National Air Pollution Control Administration, exemplifies the scientific understanding of the time. In the context of extended testimony before the Senate Subcommittee on Air and Water Pollution on the Clean Air Amendments of 1970, Dr. Middleton lent credence to the threshold model by testifying that it could yield "a level of air quality that will be protective of health." *Id.* at 1184. According to Dr. Middleton, "The criteria documents state the level at which [health] effects begin, some measurable things that are observed to take place. The Clean Air Act provides that the standards shall be protective of health, which means they must be lesser than the level at which this thing was observed." *Id.* at 1185.[14]

---

[13] These five pollutants – sulfur oxides, particulates, carbon monoxide, hydrocarbons, and photochemical oxidants – were at the time all considered threshold pollutants, as evidenced by exhibit 1 presented by Senator Muskie to the Senate. Legislative History of the Clean Air Amendments of 1970, Vol. I, at 243-47. The fact that thresholds had already been identified for these pollutants was referred to repeatedly throughout legislative reports and debates. See, e.g., Senate Committee on Public Works Report, *id.* at 409; Remarks of Representative Jarman, Legislative History, Vol. II at 815.

[14] The Senate Committee on Public Works Report demonstrates that the Committee concurred with Dr. Middleton's interpretation: "Ambient air quality is sufficient to protect the health of such persons whenever there is an *absence of adverse effect* on the health of a statistically related sample of

In adopting the threshold concept as the underlying principle by which air quality standards are set, Congress' original mandate to EPA was therefore quite simple. It directed EPA to isolate thresholds for air pollutants and then, without performing cost-benefit analysis, to promulgate strict standards with "an adequate margin of safety" to assure that those concentration levels were not reached. Or, as Senator Muskie put it, "[The Act] states that all Americans in all parts of the Nation should have clean air to breathe, air that will have *no* adverse effects on their health." Legislative History, Vol. I, at 224 (emphasis added).

2. The Clean Air Amendments of 1977

After passage of the 1970 Amendments, the EPA began setting air quality standards "on the assumption that [ ] thresholds d[id] exist."[15] By 1977, however, legislators knew that the language of Section 109 had been based on a myth – that pollutants covered by Section 109 standards were not all threshold pollutants. Indeed, several of the pollutants, including ozone, which were previously considered threshold pollutants, were now clearly

---

persons in sensitive groups from exposure to the ambient air." *Id.* at Vol. I, 410 (emphasis added). Accordingly, the Committee instructed, "An ambient air quality standard, therefore, should be the maximum permissible ambient air level of an air pollution agent which will protect the health of any group of the population." *Id.*

[15] See Senate Comm. On Public Works, 93rd Cong., 2d Sess., Coordinating Comm. on Air Quality Studies, Nat'l Academy of Sciences, Air Quality and Automobile Emission Control 17 (Comm. Print 1974).

identified by legislators as non-threshold pollutants – pollutants that yield adverse health effects at *any* concentration level. Moreover, because non-threshold pollutants are adverse to public health at any level, legislators knew that setting "safe" standards for such pollutants was not only economically undesirable but, as a practical matter, impossible.[16] Nevertheless, Congress declined to provide EPA meaningful guidance in setting NAAQS for non-threshold pollutants.

The House Committee on Interstate and Foreign Commerce's Report on the 1977 Clean Air Amendments expressly declared that the threshold concept underlying the 1970 Amendments was misguided. The Committee admitted that while *"[t]he national primary standards are based on the assumption that a no-effects threshold exists and can be proved; in fact, this assumption appears to be false."* Legislative History of the Clean Air Amendments of 1977, Vol. IV, at 2577 (emphasis in original). It quoted a National Academy of Sciences study reflecting the scientific understanding of the time. That study concluded:

> [I]n no case is there evidence that the threshold levels have a clear physiological meaning, in the sense that there are genuine adverse health effects at and above some level of pollution, but no effects at all below that level. On the contrary, evidence indicates that the amount of health damage varies with upward and downward variations in the concentration level of the pollutant, with no sharp lower limit.

---

[16] For example, ozone is present naturally in the atmosphere while PM results from almost all combustion.

Id. Ultimately, the Committee itself concluded: "[T]he 'safe threshold' concept is, at best, *a necessary myth to permit the setting of some standards.*" *Id.* at 2578 (emphasis added).

After admitting that the threshold concept was flawed, however, the Committee simply declined to address the enormous regulatory problem posed by non-threshold pollutants, namely how EPA can promulgate non-arbitrary standards for non-threshold pollutants without banning those pollutants altogether. The Committee concluded as follows: "Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should be set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical." *Id.* at 2594. The Committee therefore recognized that Section 109's language could not be logically applied to non-threshold pollutants, but proposed no alternative.

The House and Senate debates on the 1977 Clean Air Amendments mirrored the House Committee Report. In the House, Representative Bingham declared: "We now know that there is no such thing as a safe level of air pollutants. The only safe level of sulfur dioxides, nitrous oxides, hydrocarbons and the rest, especially given their synergistic effects, can only be zero." *Id.*, Vol. VII, at 6222. In the Senate, meanwhile, Senator Muskie stated: "[T]estimony on the health question over the last 7 years over and over again has made the point that there is no such thing as a threshold for health effects." *Id.*, Vol. III, at 1030. Accordingly, Senator Muskie conceded that

under the standards then in effect, "there [were] health effects that [were] not protected against." *Id.* Congress thus expressly disavowed the threshold concept without changing Sections 108 and 109 to reflect the newfound understanding of ambient air quality.

Because it did not wish to make an admittedly tough policy choice about which principle should guide the establishment of NAAQS for non-threshold pollutants, Congress left in place the anachronistic "requisite to protect the public health" "with an adequate margin of safety" language that does not provide an intelligible principle for air quality regulation. The statutory language is a complete mismatch with the scientific reality, as Congress itself recognized. Many adverse health effects can only be eliminated through a complete ban on non-threshold pollutants, yet Congress expressly dismissed this option as infeasible.[17] And, in any event, since ozone and nitrogen dioxide, among other non-threshold pollutants, occur naturally in the environment, EPA could not eliminate them entirely even if it wanted to do so. Therefore, as George T. Woolf, former Chairman of the EPA's Clean Air Scientific Advisory Committee has

---

[17] Moreover, "public health" is really not even fully protected through a complete ban on non-threshold pollutants. For example, reducing ozone levels leads to adverse health effects, such as skin cancer, see Randall Lutter & Christopher Wolz, *UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standards*, 31 Envtl. Sci. & Tech. 142A, 145 (1997), and efforts to rid the atmosphere of particulate matter would cause economic devastation and thus lead to a host of significant adverse health effects. See *American Trucking Associations, Inc.*, 175 F.3d at 1038 n.4.

recognized, the application of Section 109(b)(1), which is based on the 1970 threshold concept, to non-threshold pollutants, is not only undesirable but impossible.[18] Moreover, the existence of the "adequate margin of safety" mandated by the provision is itself contingent upon the existence of a threshold level above zero, a threshold level which in most cases does not exist. As such, the statute as written simply cannot be applied to non-threshold pollutants.[19] But despite its clear recognition of the dilemma created by its prior directive, Congress knowingly chose not to remedy its error and articulate an intelligible principle by which to regulate non-threshold pollutants.

B. EPA's Attempts to Set NAAQS Demonstrate that Congress Has Failed to Provide EPA with an Intelligible Principle for Setting Air Quality Standards for Non-Threshold Pollutants.

It is now known that most, if not all, of the six pollutants currently regulated under Section 109 are non-

---

[18] Woolf has stated, "[T]he paradigm of selecting a standard at the lowest-observable-effects-level and then providing an 'adequate margin of safety' is not possible." EPA's Rulemakings on the National Ambient Air Quality Standards for Particulate Matter and Ozone: Hearings Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong. 89 (1997) (statement of George T. Woolf).

[19] The House Committee on Interstate and Foreign Commerce itself recognized in 1977 "that the margin of safety concept is . . . an illusion." Legislative History of the Clean Air Amendments of 1977, Vol. IV, at 2578.

threshold pollutants.[20] In establishing NAAQS, EPA has acknowledged that it has been unable to identify any discernible threshold for adverse health effects with respect to ozone, see 62 Fed. Reg. 38,856, 38,863 (1997), particulate matter, see 62 Fed. Reg. 38,652, 38,670 (1997), sulfur dioxide, see 53 Fed. Reg. 14,926, 14,930 (1988), carbon monoxide, see 50 Fed. Reg. 37,484, 37,487-88 (1985), or nitrogen dioxide, see 50 Fed. Reg. 25,532, 25,538-39 (1985). And although EPA did identify a discernible threshold for the only other pollutant regulated under Section 109 – lead – in setting a 1978 NAAQS, see 43 Fed. Reg. 46,246, 46,247-49, it has since admitted that lead appears to be a non-threshold pollutant as well.[21]

Consequently, in implementing Section 109, EPA has faced the following choice: (1) set NAAQS for non-threshold pollutants at zero; or (2) arbitrarily select a non-zero standard at which adverse health effects still exist. Given that the first option is at odds with the intent of Congress and impossible to achieve (as well as economically devastating to attempt), it is not surprising that EPA has chosen the second path.

The problem with this choice, however, is that the Clean Air Act "provides no guidance as to how EPA

---

[20] See Mark K. Landy, et al., *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* 55-56, 78-79 (1994).

[21] See Air Quality Management Division, U.S. EPA, *Review of the National Ambient Air Quality Standards for Lead: Assessment of Scientific and Technical Information*, at III-54 (1989) ("the available data . . . suggest a continuum of health risks down to the lowest levels measured").

should determine what non-zero level of risk is acceptable."[22] Because the Act is based on the anachronistic threshold concept, "the result of the statutory framework is to misframe the key question and also to give EPA little guidance for answering and asking that question."[23] The lack of direction provided to EPA is especially problematic because of the enormous impact the agency's policy choices can have on the nation's economy.[24]

Absent an intelligible principle by which to set NAAQS for non-threshold pollutants, EPA has behaved in one of two ways. First, in certain cases it has openly admitted that its standards do not guard against known adverse health effects, while making little if any effort to explain how allowing such effects to occur is consistent with the Act's requirement that standards protect public health "with an adequate margin of safety." For example, one wonders in the instant case why it is consistent with the statute for 58,000 children a year in nine of our nation's urban areas to experience "large lung function decreases" because of exposure to ozone, but inconsistent with the statute for 97,000 children to experience such effects. See 62 Fed. Reg. 38,856, 38,865; see also 43 Fed. Reg. 46,246, 46,253-55 (1978) (over 20,000 children will have unsafe blood lead levels under lead NAAQS).

---

[22] Feller, *supra* note 12, at 832.

[23] Sunstein, *supra* note 12, at 376.

[24] For example, the cost of attaining EPA's revised PM standards is estimated to be anywhere from $37 billion to $150 billion annually, reducing the real after-tax income of the average American by 1-2%. See Brief of Respondents Appalachian Power Company, *et al.*, No. 99-1426, at 17.

Alternatively, EPA often seeks to disguise the arbitrary nature of its standards by mischaracterizing scientific data to make it appear as though a threshold may exist where in fact none does. As a former EPA attorney notes, "Where evidence suggests a continuum of effects at all pollutant concentrations, EPA has characterized the data as establishing uncertainty as to the threshold levels rather than suggesting that no threshold level exists."[25] This is encouraged by the Clean Air Act itself as "the need to choose some non-zero 'safe' level of pollution creates an incentive for this sort of risk recharacterization." *Id.* at 844. One commentator has identified the EPA's modus operandi as an "intentional science charade" where "agency bureaucrats consciously disguise policy choices as science."[26] Because no non-zero standard is "safe," EPA inevitably considers economic factors in setting standards though costs must be publicly disregarded by the agency because of the statutory language.[27]

The statute's lack of an intelligible principle thus makes effective judicial review of air quality standards impossible. Courts, like EPA, are given no guidance as to the level of adverse health effects that is acceptable, and must review rulemaking proceedings in which EPA understandably distorts complex scientific data and

---

[25] Feller, *supra* note 12, at 838. For detailed case studies of this phenomenon regarding particulate matter and ozone, see *id.* at 838-854, and Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613, 1640-44 (1995), respectively.

[26] Wagner, *supra* note 25, at 1640.

[27] See *id.* at 1641.

refuses to acknowledge key factors influencing its decisions in a bid to fit a square peg in a round hole. If the status quo is maintained, one noted legal scholar has predicted, "The day will eventually come when the same court of appeals holds that EPA has behaved unlawfully both for regulating above a certain level and for regulating below that level!"[28]

III. THIS COURT SHOULD HOLD SECTION 109(B)(1) UNCONSTITUTIONAL AS APPLIED TO NON-THRESHOLD POLLUTANTS.

In asking this Court to invalidate Section 109(b)(1) as applied to non-threshold pollutants, *amici* recognize that we are asking this Court to take a significant step, but it is an appropriate one under the circumstances.

The decision as to what principle should be used to set air quality standards is "quintessentially one of legislative policy," *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring), and one with enormous impact on the health of the American people and the vitality of the nation's economy. It involves no subject, such as foreign affairs or Indian affairs, where the executive branch possesses "residual authority," *id.* at 684, nor any power, such as the management of public property, that is not legislative.[29]

---

[28] Sunstein, *supra* note 12, at 322.

[29] In both areas, this Court has properly adopted a deferential stance with respect to congressional delegations. See Schoenbrod, *supra* note 11, at 1265.

Furthermore, Congress' failure to provide an intelligible principle here is not justified by the " 'inherent necessities' of the situation." *Id.* at 676. In a variety of other statutes regulating pollutants and hazardous substances, Congress has expressly set forth intelligible principles, such as cost-benefit analysis and technological feasibility, to guide agency discretion. See e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136(bb), 136a(c)(5)(D) (utilizing cost-benefit analysis); Clean Water Act, 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1) (employing standards based on technological feasibility); Safe Water Drinking Act, 42 U.S.C. § 300g-1(b)(4)(D) (using standards of economic and technological feasibility). Moreover, agencies themselves have adopted principles for managing risk, such as defining a maximally acceptable risk, which Congress could use in this context.[30]

For constitutional purposes, it is not significant which principle is ultimately chosen; what is significant is that Congress supplies it. *Amici*, for instance, may agree with Cross-Petitioners that cost-benefit analysis from a policy perspective reflects a sensible way of developing air quality standards under Section 109. This purported interpretation, however, is no more supported by the language of the statute and the legislative history than is

---

[30] See Joseph V. Rodricks, et al., *Significant Risk Decisions in Federal Regulatory Agencies*, 7 Regulatory Toxicology and Pharmacology, 307, 309-13 (1987).

a maximally acceptable risk standard, technological feasibility standard, or a host of other standards Congress could have supplied, but did not.[31]

While the D.C. Circuit thus correctly ruled that EPA's construction of Section 109(b)(1) in its ozone and PM rules effectuated an unconstitutional delegation of power, the remedy it ordered was inappropriate. In light of Congress' abdication of its responsibility to set forth an intelligible principle for setting air quality standards for non-threshold pollutants, the court's decision to allow EPA to "extract a determinate standard on its own" was in error. *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999). As no intelligible principle is "apparent from the statute," *id.* at 1034, or the legislative history, the appropriate remedy here is to hold Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

The underlying purpose of the nondelegation doctrine is not vindicated by a remedy ordering that "EPA in effect draft a different, narrower version of the Clean Air Act." *American Trucking Associations, Inc. v. EPA*, 195 F.3d 4, 15 (D.C. Cir. 1999) (Silberman, J., dissenting from denial of rehearing en banc). Section 109 either provides

---

[31] While it could be argued that EPA's choice of any of these principles might pass muster under the framework of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), this does not save the statute from a nondelegation doctrine challenge. On the contrary, the fact that multiple contradictory intelligible principles would pass muster under *Chevron* itself demonstrates that Congress has run afoul of the nondelegation doctrine by failing to supply *its own* intelligible principle for setting air quality standards.

an intelligible principle for setting NAAQS for non-threshold pollutants or it does not. If it does, EPA's failure to articulate that principle, while legally troubling on other grounds, does not implicate the nondelegation doctrine. But if, as we believe, Section 109 provides no such intelligible principle, the fact that EPA may be able to supply its *own* intelligible principle cannot save the statute from a nondelegation doctrine. *The constitutional basis of the nondelegation doctrine is that Congress, not executive agencies, must make important policy choices, which form the core of the legislative power.*

Though the precedent set here may contradict recent jurisprudential trends, the rule of law is really a modest one: Congress is free to legislate or not, or to delegate its authority or not, as it sees fit; all it may not do is to effectuate a wholesale transfer of the legislative power to the executive. That is the essence of the separation of powers. The crucial limiting factor is the requirement of an intelligible principle.[32] Accordingly, this Court should require Congress to fulfill its constitutional responsibility to set forth an intelligible principle by which EPA is to set air quality standards for non-threshold pollutants by holding Section 109(b)(1) unconstitutional as applied to non-threshold pollutants.

---

[32] Limits must exist on Congress' ability to delegate legislative power to executive agencies. Surely, for example, Congress could not direct the Internal Revenue Service to set tax rates so that "the public interest, convenience, and necessity will be served." Cf. 47 U.S.C. § 309(a).

CONCLUSION

To paraphrase Chief Justice Rehnquist in *Industrial Union Dep't*, 448 U.S. at 687, if this Court is ever to reshoulder the burden of ensuring that Congress itself make critical policy decisions, this is surely the case in which to do it. For the foregoing reasons, *amici* respectfully request that this Court revitalize the nondelegation doctrine by holding Section 109(b)(1) of the Clean Air Act unconstitutional as applied to non-threshold pollutants.

Respectfully submitted,

WILLIAM H. MELLOR*
CLINT BOLICK
DEBORAH SIMPSON
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
(202) 955-1300

ROGER PILON
TIMOTHY LYNCH
ROBERT A. LEVY
RONALD D. ROTUNDA
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200

Counsel of Record

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

No. 99-1257

In The

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

versus

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE MANUFACTURERS ALLIANCE/MAPI INC., THE ALUMINUM ASSOCIATION, AND THE STEEL MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

*David Schoenbrod
New York Law School
57 Worth Street
New York, New York
10013
(212) 431-2339

Deborah Paulus
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7981

Marci A. Hamilton
40 Washington Square
South
New York, New York
10012
(212) 992-8824

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly rejected the Environmental Protection Agency's standardless interpretation of Section 109 of the Clean Air Act, 42 U.S.C. § 7409 (1994).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PERMISSION TO FILE BRIEF AS *AMICI CURIAE* .. 1

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. CONGRESSIONAL DELEGATION AND THE DELEGATION DOCTRINE 5

A. The Delegation Doctrine Has a Long Pedigree as a Fundamental and Enforceable Part of the Constitution 6

B. The Supreme Court's Delegation Jurisprudence Needs Reinforcement to Serve the Goals of the Delegation Doctrine 9

II. THIS COURT SHOULD REJECT EPA'S INTERPRETATION OF SECTION 109 OF THE CLEAN AIR ACT 12

A. The EPA's Interpretation Fails to Provide An Intelligible Principle to Bound Its Authority .. 13

B. EPA Erred in Overlooking the Clear Meaning of the Clean Air Act, Which Is Consonant with this Court's Delegation Doctrine 15

C. EPA's Strategic Maneuvers 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 1, 5, 9, 10, 15

Amalgamated Meat Cutters and Butcher Workmen v. Connolly, 337 F. Supp. 737 (D.D.C. 1971) 14

American Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027 (1999) 26

Amoco Oil v. EPA, 501 F.2d 722 (D.C. Cir. 1974) 23

Arizona v. California, 373 U.S. 546 (1963) 14

Automotive Parts & Accessories Ass'n, Inc. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) 24

AT&T Corp. v. Iowa Public Utilities Bd., 525 U.S. 366 (1999) 11

Cargo of the Brig Aurora v. United States, 11 U.S. 382 (1813) 6

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 9

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 28

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 14

City of Boerne v. Flores, 521 U.S. 507 (1997) 12

Clinton v. City of New York, 524 U.S. 417 (1998) .. 2, 11, 15

Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) .. 22, 23, 24

Ethyl Corp. v. EPA, 5 Envtl. Law Rep. 20096 (D.C. Cir. Jan 28, 1976) 23

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 10

TABLE OF AUTHORITIES – Continued

Page

Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980) 4, 6, 11, 27

INS v. Chadha, 462 U.S. 919 (1983) 10

Jordan v. De George, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951) 10

J.W. Hampton v. United States, 276 U.S. 394 (1928) 5, 8, 9, 10

Kent v. Dulles, 357 U.S. 116 (1958) 6

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 12

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 8

Lead Industries Assoc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 1042 (1980) 2, 22, 24

Loving v. United States, 517 U.S. 748 (1996) 2, 6

Ludecke v. Watkins, 335 U.S. 160 (1948) 6

Mistretta v. United States, 488 U.S. 361 (1989) 5, 11

National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 11

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 10

Natural Resources Defense Council v. EPA, D.C. Cir. No. 72-2233 (Order, Oct. 28, 1973) 21

Natural Resources Defense Council v. Train, 545 F.2d 320 (2d Cir. 1976) 21, 22

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) .. 5, 9, 10

Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) 9

TABLE OF AUTHORITIES – Continued

Page

Raines v. Byrd, 521 U.S. 811 (1997) 2

Smith v. Goguen, 415 U.S. 566 (1974) 10

Stoutenburgh v. Hennick, 129 U.S. 141 (1889) 6

Touby v. United States, 500 U.S. 160 (1991) 5

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 15

United States v. Darby, 312 U.S. 100 (1941) 9

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 7

United States v. Lopez, 514 U.S. 549 (1995) 12

United States v. Morrison, 120 S. Ct. 1740 (2000) 12

United States v. Rock Royal Co-op, 307 U.S. 533 (1939) 11

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 7

Wickard v. Filburn, 317 U.S. 111 (1942) 9

Yakus v. United States, 321 U.S. 414 (1944) 15

U.S. CONSTITUTION

U.S. Const. Art. 1, § 1 ..... 4, 5

CLEAN AIR ACT

42 U.S.C. § 7408(a)(2) (1994) 19

42 U.S.C. § 7409 (1994) 4

42 U.S.C. § 7409(b)(1) (1994) 13, 16, 19

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 7411 (1994) 20

42 U.S.C. § 7416 (1994) 20

42 U.S.C. §§ 7501-7515 (1995) 2, 25

42 U.S.C. §§ 7521(i)(2)(A), (i)(3)(B)(i) (1994) 25

42 U.S.C. § 7545(c)(1)(A) (1994) 22

42 U.S.C. § 7602(h) (1994)..... 19

LEGISLATIVE HISTORY

36 Fed. Reg. 8186-87 (1971) 20

36 Fed. Reg. 1486 (1971)..... 21

62 Fed. Reg. 38,688, 38,383 (1997)..... 5

Pub. L. 91-604, § 4(a), 84 Stat. 1680 (1970) 19

116 Cong. Rec. 42381 (1970) 24

123 Cong. Rec. 18055 (1977) 16

Clean Air Act Amendments of 1977: Hearings Before the Senate Subcom. On Environmental Pollution of the Senate Comm. On Environmental and Public Health, 95th Cong., 1st Sess., pt. 3 at 8 (1977)..... 14

Reorganization Plan No. 3 of 1970, § 2(a)(3)-(4), 3 C.F.R. 1072 (1970), *reprinted in* 84 Stat. 2086 (1970) 16

1 *Legislative History of the Clean Air Act Amendments of 1970* at 232 (Senate Debates on § 4358, Sept. 21, 1970)..... 27

EPA Office of Air Quality Criteria Development, *Airborne Lead* (Draft, Jan. 7, 1971)..... 21

TABLE OF AUTHORITIES – Continued

Page

BOOKS

Henry J. Abraham, *Justices and Presidents* (1974) 9

Gregg Easterbrook, *A Moment on the Earth* (1995) ...20, 25

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 9

Frank P. Grad, *Public Health Law Manual: A Handbook on the Legal Aspects of Public Health Administration and Enforcement* (1965) 17, 20

Sir A. Bradford Hill, *Principles of Medical Statistics* (7th ed. 1961) 18

Sir A. Bradford Hill, *Principles of Medical Statistics* (9th ed. 1971) 18

John R. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* (1976) 21

David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).....7, 28

Alex de Tocqueville, *Democracy in America* (Phillips Bradley, ed., 1946)..... 7

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 11

ARTICLES

Lisa S. Bressman, *Essay: Schechter Poultry at the Millenium: A Delegation Doctrine for the Adminstrative State*, 109 Yale L.J. 1399 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

Marci A. Hamilton, *Discussions and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477 (1994) 28

Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999) 7

John F. Manning, *Textualism As A Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997) 11

Edmund Muskie and Elliot Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 Maine L. Rev. 163 (1973) 27

Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 Houston L. Rev. 679 (1999) ..16, 17

Cass R. Sunstein, *Delegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 7, 8, 11

With Our Readers, 13 Const. Rev. 98 (1929) 8

NEWSPAPERS AND PERIODICALS

Pranay Gupte and Bonner R. Cohen, *Carol Browner, Master of Mission Creep*, Forbes, Oct. 20, 1997 at 170 25

Antonin Scalia, *How Democracy Swept the World*, Wall Street Journal, Sept. 7, 1999 at A24 7

David Schoenbrod, *Confessions of An Ex-Elitist*, Commentary, Nov. 1999 at 36 24

TABLE OF AUTHORITIES – Continued

Page

HISTORICAL AUTHORITIES

Thomas Jefferson, *Jefferson's Notes on the States of Virginia*, Query XIII (Merrill D. Peterson, ed., 1975) 6

James Madison, *Notes of Debates In the Federal Convention of 1787* (Adrienne Koch, ed., Ohio Univ. Press 1966) 3

Baron de Montesquieu, *The Spirit of Laws* (G. Bell & Sons, ed., London 1914) 3, 7

The Virginia Report of 1799-1800, Touching of the Alien and Sedition Laws, Together with the Virginia Resolutions of December 21, 1798 (Leonard W. Levy, ed., 1970) 7

PERMISSION TO FILE AS *AMICI CURIAE*

This amicus curiae brief in support of Respondents is filed pursuant to Sup. Ct. R. 37.2. Letters of permission from each party have been filed with this Court.[1]

INTERESTS OF *AMICI CURIAE*

The Manufacturers Alliance/MAPI Inc. ("MAPI"),[2] the Aluminum Association, and the Steel Manufacturers Association were "industry associations" under the National Industrial Recovery Act of 1933, which this Court struck in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) ("Schechter Poultry").

These associations now represent corporations that are vitally concerned with the increased stringency of the National Ambient Air Quality Standards ("NAAQS") at issue in this case. The Clean Air Act ("Clean Air Act" or "CAA") grants the Environmental Protection Agency ("EPA") broad powers over states not attaining these standards. The states are forced to take action against businesses, local governments, and others – including placing sharp curbs on investment in new plant and

---

[1] Pursuant to Sup. Ct. R. 37.6, counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its member, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] MAPI filed an amicus brief in support of Respondents' cross-petition for certiorari, in which MAPI provided a more detailed statement of MAPI's history and interest in the delegation doctrine.

equipment. If a state fails to take action needed to comply with the NAAQS, the EPA will impose sanctions on the state government and on private economic activity. 42 U.S.C. §§ 7503(a)(4), 7509 (1994). By tightening the NAAQS pursuant to its own policy judgment, the EPA has thrown much of the nation into long-term "nonattainment" and thereby increased its power with serious adverse consequences for the nation and members of MAPI.

The authors of this brief have filed amicus briefs in three previous cases implicating the delegation doctrine, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Raines v. Byrd*, 521 U.S. 811 (1997); *Loving v. United States*, 517 U.S. 748 (1996), to delineate the history, purposes, and constitutional significance of the delegation doctrine. They write this brief on behalf of MAPI, the Aluminum Association, and the Steel Manufacturers Association to explain how the delegation doctrine applies to this case.

One of the authors of this brief, Professor Schoenbrod, has a special relationship to the issues in this case, as he successfully represented environmental organizations throughout the 1970s in a series of cases that culminated in *Lead Industries Ass'n. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 1042 (1980) ("Lead Industries"), a precedent upon which the EPA critically and futilely relies. Schoenbrod argued for an interpretation of the Clean Air Act in the 1970s on behalf of environmental groups that is contrary to the EPA's claim in this case that it may choose the extent to which it protects public health

and thus the scope of its power over the states and the nation. *See infra*.

SUMMARY OF ARGUMENT

This case offers a classic example of the self-aggrandizement by government officials feared by the Framers of the Constitution. As James Madison stated, "[t]he truth was that all men having power ought to be distrusted to a certain degree."[3] The delegation doctrine is a fundamental separation of powers principle that requires the legislative branch to make the laws. In Montesquieu's words, which were taken seriously by the Framers: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Baron de Montesquieu, *The Spirit of Laws*, Book XI, part 6 (G. Bell & Sons, ed., London 1914).

The Framers' fundamental understanding of human nature continues to be relevant. Because the country is coming into increasing compliance with existing NAAQS, EPA is losing its power over areas designated in "attainment" with the NAAQS. By tightening those standards

---

[3] James Madison, *Notes of Debates in the Federal Convention of 1787* 272 (Adrienne Koch ed., Ohio Univ. Press 1966); *see also id.* at 266 ("From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it.") (statement of Col. George Mason)).

and thereby sharply raising the bar for attainment, it is attempting to renew its waning power.

One of the ways that the Framers sought to curb self-aggrandizement by officials was to require that "[a]ll legislative Powers herein granted shall be vested in a Congress . . . " U.S. Const., art. I, § 1. The delegation doctrine is a constitutional norm that reflects the letter of Article I, Section 1, and that prohibits unelected, unaccountable agency officials from unbounded discretion to impose regulations. In this case, the delegation doctrine is a powerful constitutional tool that should inform this Court's interpretation of Section 109 of the Clean Air Act. 42 U.S.C. § 7409 (1994).

The plain language, structure, and history of the Clean Air Act as well as common sense dictate a narrower interpretation of the statute than the EPA invoked. "Protect public health" in the CAA does not grant the EPA carte blanche to protect health to the extent it chooses, but rather only to protect health from *significant* risk. *See infra*. This correct and more reasonable interpretation pegs the EPA's authority to Congress's policy determination, satisfies this Court's delegation doctrine, and therefore corrects the constitutional violation found by the court below. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"). The EPA sidled towards this interpretation of the Act only after losing in the court below.[4] The EPA's last-

[4] In this Court, the Administrator has implied that she considers the significance of risks by stating that "the health effects justifying a NAAQS must be 'adverse' in the sense that they are medically significant and not merely detectable." EPA Br. 24 (internal citation omitted); *see also* EPA Cert. Pet. 15 (same). But during the rulemakings below, she asserted the right to render decisions that do *not* address "what risk is 'acceptable,' " through quantification "or any other metric;" that are based on "no generalized paradigm;" that are thus "largely judgmental in nature." 62 Fed. Reg. at 38,688 (PM), 38,883 (ozone) (1997). In the court of appeals, she continued to insist that "nothing in the statute requires [her] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Br. in 97-1441, at 43 (emphasis added). She specifically rejected the need to determine that there is a "significant risk of harm." *Id.* at 42.

minute conversion cannot redeem the rulemaking before this Court in this case, which was based on a constitutionally fatal interpretation of the CAA.

ARGUMENT

I. CONGRESSIONAL DELEGATION AND THE DELEGATION DOCTRINE

This Court's delegation doctrine requires that, at a minimum, Congress identify an "intelligible principle" to guide the exercise of delegated legislative power. *See, e.g., Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Schechter Poultry*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935) ("Panama Refining"); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("J.W. Hampton"). The doctrine goes to the heart of the Constitution's separation of powers and, especially Congress's role in Article I, the plain language of which reposes all lawmaking authority solely in Congress. *See* U.S. Const., art. I,

§ 1. "The delegation doctrine [was] developed to prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 757.

In this case, the delegation doctrine is a background constitutional norm that drives the result. If the EPA's interpretation is correct, then the agency's actions are unbounded by congressional guidance and fail even the most lax interpretation of the delegation doctrine. In general, however, this Court has found it appropriate, as a coordinate federal branch, to interpret delegations of authority narrowly to avoid constitutional violations. *See, e.g., Benzene*, 448 U.S. at 646; *Kent v. Dulles*, 357 U.S. 116, 128-30 (1958); *Stoutenburgh v. Hennick*, 129 U.S. 141, 149 (1889). Such an interpretation is available here.

A. The Delegation Doctrine Has a Long Pedigree as a Fundamental and Enforceable Part of the Constitution

The principle against delegation precedes the drafting of the Constitution. While the Articles of Confederation were in place, Thomas Jefferson stated that "[o]ur ancient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise." Thomas Jefferson, *Jefferson's Notes on the State of Virginia*, Query XIII 173 (Merrill D. Peterson, ed., 1975). From the earliest days of the Constitution, there is ample evidence demonstrating that the Framers, this Court, and others believed that representatives should be required to make the hard policy choices. *See Ludecke v. Watkins*, 335 U.S. 160 (1948) (discussing Alien Act of 1789); *Cargo of the Brig*

Aurora v. United States, 11 U.S. (7 Cranch) 382, 388-89 (1813); Montesquieu, *supra*; Alexis de Tocqueville, *Democracy in America* 57-58 (Phillips Bradley ed. 1946); *The Virginia Report of 1799-1800, Touching of the Alien and Sedition Laws, Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970).

Our Constitution has been so successful because it assigns power to entities with meaningful limitations on their exercise of power. In Justice Scalia's words, "the most significant development in the law over the past thousand years is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people." Antonin Scalia, *How Democracy Swept the World*, Wall Street Journal, Sept. 7, 1999 at A24.

The often repeated proposition that Congress regularly violated the delegation doctrine from the beginning, *see, e.g.*, Cass R. Sunstein, *Delegation Canons*, 67 U. Chi. L. Rev. 315, 318 (2000), is simply wrong and springs from a falsely simplified understanding of what the doctrine requires. *See* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 30-33 (1993) (discussing examples from 18th and 19th centuries); Marci A. Hamilton, *Representation and Non-delegation: Back to Basics*, 20 Cardozo L. Rev. 807 (1999) (discussing Framers' intent).

On at least three occasions prior to 1928, this Court struck statutes on delegation grounds. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend, or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921)

(holding that a vague statute amounted to a delegation by Congress of legislative power to courts . . . "); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states). Thus, the often-repeated proposition that this Court never struck statutes for unconstitutionally delegating prior to 1935 is also wrong. *See, e.g.*, Sunstein, *supra*.

In 1928, this Court empowered an unelected commission to set tariffs. The Court announced a new test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. The "intelligible principle" in that case provided only limited direction to the commission so that the statute, in fact, delegated legislative power. President-elect Herbert Hoover objected to the new Commission on delegation grounds, saying that:

> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 Const. Rev. 98, 100 (1929) (quoting President Hoover's speech of Oct. 15, 1928).

Despite the broad and troubling language of *J.W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced the tremendous increase in the scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Industrial

Recovery Act, called it "delegation running riot." *Schechter Poultry*, 295 U.S. at 553. The constitutional potential in the *J.W. Hampton* rule is emphasized by the 9-0 and 8-1 votes finding Congress's delegation unconstitutional in *Schechter Poultry*, *id.* at 551, and *Panama Refining*, 293 U.S. at 433, respectively.

B. The Supreme Court's Delegation Jurisprudence Needs Reinforcement to Serve the Goals of the Delegation Doctrine

President Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the resolve of some members of the Court to invalidate congressional delegations. *See* Henry J. Abraham, *Justices and Presidents* 198 (1974). When the dust settled, it became clear that the fault was not altogether with the President. The Court itself had let the policy proclivities of some of the Justices unduly drive its jurisprudence, especially in substantive due process and federalism decisions. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935). Having been caught with its hand in the policy "cookie jar," and shaken by the court-packing plan, the Court retreated from the bedrock requirement of Article I that Congress take responsibility itself to make the law. As John Hart Ely has put it, the delegation doctrine suffered "death by association." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 133 (1980). The limitations on the scope of the federal government suffered a similar fate as the Court seemingly gave the "commerce power" a limitless interpretation. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941);

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Nonetheless, recognizing the bedrock purpose of the delegation doctrine, this Court has never completely abandoned it. It has not disowned *Panama Refining* and *Schechter Poultry*. Rather, it bent the test of delegation announced in *J.W. Hampton* to accommodate the changing times. Still, the delegation doctrine has retained some vitality. Various coalitions of Justices have struck particular agency laws on delegation principles. Note, for example, the following:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976), in which the Court struck a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *See id.* at 122 (Rehnquist, J., dissenting).
- *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court struck hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *See id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases requiring not only that the public be given notice of what is forbidden, but also that executive officials be denied the power to make law. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[5]
- Various cases stricking city ordinances and state or federal statutes delegating overly broad discretion to

[5] The void for vagueness doctrine applies to civil as well as criminal offenses, *see Jordan v. De George*, 341 U.S. 223, 231-32, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).

- Various cases interpreting statutes to avoid perceived delegation problems. *See, e.g., Benzene*, 448 U.S. at 646; *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974). Relatedly, in *AT&T Corp. v. Iowa Public Utilities Bd.*, 525 U.S. 366 (1999), the Court required an agency to reconstrue a statute to avoid delegation problems.[6]
- *Clinton v. City of New York*, 524 U.S. 417 (1998), in which the Court struck Line Item Veto Act on Presentment Clause grounds, where statute delegated to the President the legislative power to repeal items of spending.

Although this Court has struck agency laws on delegation grounds in many special circumstances, it has affirmed many delegations that appear extraordinarily broad. *See, e.g., Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting); *United States v. Rock Royal Co-op*, 307 U.S. 533, 574-76 (1939) (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the hit-or-miss enforcement of the delegation doctrine continues to cause harm to representative democracy and government accountability.

[6] Scholars recognize these cases as applications of delegation principles. *See, e.g.*, Lisa S. Bressman, *Essay: Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997); Cass R. Sunstein, *Delegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

Just as this Court has seen fit to rebuild the fences around Congress's power through its recent Commerce Clause and Fourteenth Amendment, Section 5, jurisprudence, it should reinforce its delegation doctrine now. *See, e.g., United States v. Morrison*, 120 S. Ct. 1740 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995). Because this case concerns EPA's interpretation of the CAA, it offers the opportunity for this Court to vindicate the core values of the delegation doctrine without having to reach a holding on the test that the delegation doctrine requires.

The doctrine plainly counsels against the sort of unlimited discretion that the unelected EPA Administrator claims here. The EPA's statutory interpretation should be rejected, because the statute's plain language affords an intelligible principle that Congress intended. "Protect public health" in Section 109 requires not the de minimis showing favored by the Administrator in this rulemaking but rather a showing of significant risk to health. Reading "public health" to require a showing of significant risk to health would provide a meaningful check on the EPA and save the Court from reaching a holding that the Clean Air Act violates the Constitution.

II. THIS COURT SHOULD REJECT THE EPA'S INTERPRETATION OF SECTION 109 OF THE CLEAN AIR ACT

As misinterpreted by the EPA in the rulemaking, Section 109 violates this Court's delegation doctrine, while the proper interpretation of the statute does not. This Court should correct the agency's error by reading the statute correctly.

A. The EPA's Interpretation Fails to Provide An Intelligible Principle to Bound Its Authority

Section 109 empowers the EPA to set the primary NAAQS at a level "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1) (1994). The EPA chose not to base the revised standards on significant risks to health. Rather, it embraced the power to set standards whenever it determined any threat to human health was sufficient, according to its determination. *See* note 4, *supra*. This circular formulation provides the EPA with an elastic standard that allows it to set the standard where it wants. In effect, it has arrogated to itself the power to determine the scope of its power over the states and the private sector, and has not been afraid to wield this power.

Common sense and the plain language of the Act, reinforced by the structure, institutional context, and the history of the statute, make clear that Congress enacted a law that requires a showing that the risk to public health is significant. In framing the Clean Air Act in 1970, it would have made no sense for Congress to mandate a zero-tolerance standard for NAAQS. Congress knew that most pollutants presented some risk to health at any level, no matter how low and had no intention of allowing the primary standards to be set at the zero level required to eliminate all risk. Reflecting on the clean air legislation of 1970, its principle sponsor, Sen. Edmund Muskie, stated:

> Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the

> time it was inaccurate, that there is a threshold. When we set the standards, we understood that below the standard that we set there would still be health effects.

Clean Air Act Amendments of 1977: Hearings Before the Subcom. On Environmental Pollution of the Senate Comm. On Environment and Public Health, 95th Cong., 1st Sess., pt. 3 at 8 (1977).

While the EPA has not set any NAAQS at zero, it failed in the rulemaking to identify the principle it employs to decide the extent to which it will protect health. The agency's position that the statute bars it from considering the cost or feasibility of achieving the NAAQS, precludes it from falling back on a traditional "public interest" standard because then it would have to consider costs. The only factor the EPA identified as relevant was the need to protect health, but that factor does not explain the basis for its deciding where to set the standards short of zero.

The agency not only fails to identify any intelligible principle, it also hides the basis of its decision. Even under a "public interest" standard, an agency must explain its reasoning and that reasoning is subject to judicial review. *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The EPA's interpretation would allow it to escape the need to explain its reasoning, and therefore would violate the delegation doctrine. Judicial review of agency policymaking is central to judicial efforts to square permissible delegation with the Constitution. *See Amalgamated Meat Cutters and Butcher Workmen v. Connolly*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three-judge panel); *Arizona v. California*, 373 U.S. 546, 626 (1963)

(Harlan, J., dissenting in part); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Because the statute, as the EPA interprets it, fails to manifest an intelligible principle of decision and allows it to evade judicial review on the key choice in issue, it is unconstitutional under this Court's delegation doctrine. The requirement that a statute provide an intelligible principle is applied particularly strictly where, as here, the statute has an economy-wide impact, *Clinton*, 524 U.S. at 442, and where the agency would otherwise have a self-contradictory assignment. *Schechter Poultry*, 295 U.S. at 102.

The lack of an intelligible principle is also particularly worrisome where a federal agency would otherwise have broad discretion to grow its power over the states. The tougher the EPA makes its primary standard, the more power it has over the states. As this Court previously acknowledged, with the Clean Air Act, Congress "took a stick to the states." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). It is the EPA, with its power to sanction the states that wields that stick, and it makes that stick stouter when it tightens the NAAQS.

B. The EPA Erred in Overlooking the Clear Meaning of the Clean Air Act, Which Is Consonant with this Court's Delegation Doctrine

Contrary to the EPA's interpretation, the statute's clear meaning commands the EPA to set the primary standards to protect health against significant, but not insignificant threats to health. The pivotal words of the CAA, inserted in 1970, require the agency to set the

primary standards at a level which, "allowing an adequate margin of safety . . . protect[s] the public health." 42 U.S.C. § 7409(b)(1) (1994). In the context of this statute at that time, the phrase "protect the public health" meant that the EPA should protect people from threats to their health that are significant.

In enacting air pollution legislation throughout the 1960s and then, most importantly, in 1970, Congress worked closely with the public health professionals of the Public Health Service in the Department of Health, Education, and Welfare ("HEW").[7] Sen. Muskie, the chief author of the 1970 Clean Air Act, acknowledged that Congress, in crafting the provisions dealing with primary ambient air quality standards in 1970, "turned to the Public Health Service. We asked the Public Health Service to guide us . . . " 123 Cong. Rec. 18,055 (1977). At the same time as he signed the act, President Nixon created the EPA and assigned HEW's pollution control functions to it. *See Reorganization Plan No. 3 of 1970*, § 2(a)(3)-(4), 3 C.F.R. 1072 (1970), *reprinted in* 84 Stat. 2086 (1970).

Because Congress worked so closely with public health professionals in drafting the legislation and charged them with its implementation, its words should be understood from the perspective of the public health profession. The core concerns and methods of the public health profession, especially in 1970, were far different than those of contemporary environmentalism. A book published in 1965 under the sponsorship of the U.S.

---

[7] For a brief history of federal air pollution control prior to 1970, see Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 Houston L. Rev. 679, 696-702 (1999).

Public Health Service and the American Public Health Association acknowledged at the outset that "much of public health law derives historically from measures to prevent the spread of contagion and to control epidemics – and notions of an epidemiological nature still dominate much of public health law." Frank P. Grad, *Public Health Law Manual: A Handbook on the Legal Aspects of Public Health Administration and Enforcement* 8 (1965). The book went on to warn against a fashion

> in some circles of the public health professions to downgrade the importance of preventive epidemiologic measures, stressing the more positive aspects of the job of public health to a create an affirmative wholesome environment. . . . Although esthetic considerations and the aim of a better, cleaner, more enjoyable life may furnish important motivations in the enactment and enforcement of regulations to improve the environment, nevertheless, as a matter of law such provisions must have some *considerable relationship* to the maintenance of health and the prevention of disease.

Id. at 9 (emphasis added).

In dealing with air pollution in the time leading up to the insertion of Section 109 into the Clean Air Act in 1970, there was plenty of grist for the epidemiological mill. Key motivations for congressional action include a "Killer Smog" in London in 1962, blamed for 340 deaths; a similar inversion in New York in 1963, blamed for 200 deaths; and another episode in New York in 1966, blamed for 168 deaths. Reitze, 698-99 n.6, *supra*.

In the search for significant threats or benefits to public health, epidemiologists, and by extension, the public health and preventive medicine practitioners who rely upon epidemiology, are concerned with much more than statistical significance. As one of the leading figures in epidemiology wrote in the 1961 edition of his internationally recognized standard work on the topic:

> a difference can be very highly significant and yet of no real importance whatsoever. Given a large enough number of observations, an incidence of 60 per cent. must differ 'significantly' from an incidence of 59 per cent., but that difference of 1 per cent. may be no practical importance in the affairs of life. 'Significant' and 'important' are not synonymous.

Sir A. Bradford Hill, *Principles of Medical Statistics* 142 (7th ed. 1961). Hill punctuated the end of the 1971 edition with a further observation on the imperative to search for correlations that are not only statistically significant, but also important:

> This is what matters. This is what we want to know and should be told. For it is upon this difference that we shall base our future actions whether it is worthwhile exhibiting the drug or not. . . . Technical skills, like fire, can be an admirable servant and a dangerous master.

Hill, 323, *supra*.

In sum, the key language of the statute – "protect public health" – if read in the relevant context, yields an intelligible principle. That context is the world of the public health profession in 1970, which would have understood "protect public health" to mean protect it

from threats that are significant, not to try to make the world perfectly safe or as safe as the EPA finds it institutionally convenient.

An examination of the statute as a whole reinforces what common sense and the legislative history tell us. The requirement that the EPA include an "adequate," and not a "perfect," "margin of safety," connotes a cut-off based on the significance of the risk. 42 U.S.C. § 7409(b)(1) (1994). The NAAQS are based upon the criteria documents, which must evaluate both the "kind and extent" of a pollutant's impact on health. 42 U.S.C. § 7408(a)(2) (1994).

The distinction between concerns that rise to threats to "public health" and lesser concerns is buttressed by the differences between the primary and secondary standards. While the primary standards are to "protect public health," the secondary standards are to "protect welfare." The latter also bear on health. Section 302h of the statute defines public welfare to include "comfort and well-being." 42 U.S.C. § 7602(h) (1994). The 1970 statute thus put health concerns on a two-track system, with the significant ones dealt with under the primary standards.

In keeping with this two-track system, the 1970 legislation puts a far higher priority on achieving the primary standards. Section 110(a)(2)(A)(i), added to the CAA in 1970, established a schedule under which state implementation plans must meet the primary standards within three years, while the secondary standards must be met in a "reasonable time." Pub. L. 91-604, § 4(a), 84 Stat. 1680 (1970). Although the three-year deadline for the primary standards proved unrealistic, that deadline is shorn of

any sense if the NAAQS protect against all threats to health, no matter how trivial. In contrast, the primary standards embody the public health mandate to protect health from significant risks. The pursuit of less pressing objectives – "esthetic considerations and the aim of a better, cleaner, more enjoyable life," as Professor Grad put it – were left to the flexibly enforced secondary standards as well as other flexible provisions of the statute.[8] Grad, *supra*.

C. The EPA's Strategic Maneuvers

The agency's first set of primary standards issued in 1971 shed little light on its interpretation of Section 109 because its explanations were perfunctory. *See, e.g.*, 36 Fed. Reg. 8186-87 (1971). Moreover, none of these primary standards was subjected to judicial review. The battles over airborne lead pollution produced the first judicial and administrative pronouncements pertinent to the EPA's power to set standards based on public health.

In 1970, the most troubling air pollutant was lead. *See* Gregg Easterbrook, *A Moment on the Earth* 182 (1995). As to lead, Congress spoke as if the CAA required quick action and the EPA initially acted as if it would list lead as a criteria pollutant and regulate the lead content of the

[8] *See, e.g.*, 42 U.S.C. § 7411 (1994) (new source performance standards set to take account of cost); 42 U.S.C. § 7416 (1994) (states retain authority to make air cleaner than NAAQS).

leaded gasoline used by pre-1975 vehicles.[9] Faced with opposition, the EPA backed down.

Environmental groups represented by one of the authors of this brief (Schoenbrod) filed a petition for review alleging that the EPA had illegally delayed decision on regulating lead in gasoline and the D.C. Circuit ordered the agency to decide. *Natural Resources Defense Council v. EPA*, D.C. Cir. No. 72-2233 (Order, Oct. 28, 1973). Faced with intense controversy, the EPA promulgated a compromise regulation that left much of the lead in gasoline. *See* John R. Quarles, *Cleaning Up America: An Insider's View of the Environmental Protection Agency* 119-40 (1976).

To force the EPA to implement fully the statutory policy to protect public health on a timetable, Schoenbrod filed an action to require the EPA to list lead as a criteria pollutant. The EPA took the position that whether it lists a pollutant, and thus the extent to which it protects health from that pollutant, is within its discretion. The Second Circuit rejected this argument, in part on the basis that "the deliberate inclusion of a specific timetable for the attainment of ambient air quality standards incorporated by Congress in §§ 108-110 would become an exercise in futility if the Administrator could avoid listing pollutants . . . " *Natural Resources Defense Council v. Train*, 545 F.2d 320, 327 (2d Cir. 1976).

[9] *See* EPA Office of Air Quality Criteria Development, *Airborne Lead* (Draft, Jan. 7, 1971); 36 Fed. Reg. 1486 (1971) (advanced notice of rulemaking on lead in gas).

By the same logic, Sections 108-110 would be an exercise in futility if "protect public health" grants the EPA discretion to set the primary NAAQS wherever it desires. As the Second Circuit concluded, "[t]he Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging." *Id.* at 328. In sum, the extent to which it protects health from a criteria pollutant is a statutory policy that Congress has made and the EPA must implement, not an administrative policy choice for the agency to make.

In striking contrast to the Second Circuit, the D.C. Circuit, in the *Lead Industries* opinion upon which the EPA critically relies, agreed with the EPA that the extent to which the agency protects health is the agency's policy choice. *Lead Industries*, 647 F.2d at 1153 ("the broad discretion Congress gave [the Administrator] to decide what effects to protect against"). Strangely, however, the author of that opinion, Judge Skelly Wright, previously read the statute much as the Second Circuit did. The occasion was a petition to review the regulations to protect health from the leaded gasoline used in pre-1975 vehicles. The EPA had issued it under the "will endanger" standard of Section 211(c)(1)(A) of the CAA. 42 U.S.C. § 7545(c)(1)(A) (1994). The D.C. Circuit endorsed the Administrator's reading of that language to mean "presents a significant risk of harm" and further found that the language is analogous to the "protect public health" with "an adequate margin of safety" language of Section 109. *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc).

In a dissent from a panel decision reversing the regulation, Judge Wright found that the statutory mandate to

engage in the uncertain business of protecting against risk inevitably gives the agency some measure of discretion. *Ethyl Corp. v. EPA*, 5 Envtl. Law Rep. 20,096, 20,126-20,128 (D.C. Cir. Jan. 28, 1976). But, he cautioned:

> All this is not to say that Congress left the Administrator free to set policy on his own terms. To the contrary, the policy guidelines are freely prescribed, both in the statutory term "will endanger" and in the relationship of that term with other sections of the Clean Air Act. . . . "[W]ill endanger" contemplates regulation of emissions "present[ing] a significant risk of harm." But while Congress has made the basic policy decision, the Administrator is left, in his judgment, to interpret and apply it.

Id. at 20,128.

When Judge Wright's dissent became the basis for the majority opinion in the en banc decision upholding the regulation, the passage quoted was changed to grant the EPA far broader discretion. The revised opinion deletes the last sentence in the quoted passage, which had made clear that the EPA's job is to not to make policy, but to interpret and apply the policy that Congress has made. *Ethyl Corp.*, 541 F.2d at 29. Substituted in its place is the holding that the EPA's job is to make "choices of policy." *Id.* (quoting *Amoco Oil Co. v. EPA*, 501 F.2d 722, 741 (D.C. Cir. 1974)).

Judge Wright viewed this expanded version of the EPA's discretion not just as a practical side effect of regulating in the face of uncertainty, but rather also as a deliberate judicial policy choice to favor health protection: "Regulators such as the Administrator must be

accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, *even in areas where certainty does not exist.*" *Id.* at 24 (emphasis added). In sum, a sharply divided D.C. Circuit decided that EPA may make "legislative policy judgments." *Id.* at 26.

Following the logic of his en banc opinion, Judge Wright's opinion affirming the EPA's NAAQS for lead approved the notion that the EPA performs an " 'essentially legislative task.' " *Lead Industries*, 647 F.2d at 1147 (quoting *Automotive Parts & Accessories Ass'n, Inc.*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

With the affirmation of the lead ambient standard, Schoenbrod had won a series of courtroom battles, but lost the war to get the EPA to protect a generation of children from the lead in gasoline used by pre-1975 vehicles. Although Congress had, in Sen. Muskie's words, promised that Congress had made "the hard choices" (116 Cong. Rec. 42,381 (1970)), there was enough play in the system for the EPA to make up the policy as it moved along, as exemplified by Judge Wright's view that the agency may make legislative policy on the extent to which it shall protect public health. Ironically, the children would have received more protection from lead if Congress had been prohibited from using delegation to duck the hard choice about regulation of lead in gasoline. David Schoenbrod, *Confessions of An Ex-Elitist*, Commentary, Nov. 1999 at 36, 38.

While the EPA's policymaking latitude harmed public health in the 1970s, it works another kind of harm today. Today the EPA feels different institutional imperatives.

Now, it can stand up to powerful industries. It has a large and influential constituency that wants pollution reduced regardless of evidence about its public health significance. Easterbrook, xiii-xv, *supra*. The EPA itself has the natural propensity of mature governmental institutions to prolong and enhance its mandate. *See* Pranay Gupte and Bonner R. Cohen, *Carol Browner, Master of Mission Creep*, Forbes, Oct. 20, 1997 at 170.

Of particular relevance to this case, because the nation is coming into increasing compliance with the current NAAQS, EPA's most important powers under the CAA are withering away. The real heft in the "stick" that the CAA gives EPA to wield against the states comes from the power to force them to take whatever action is necessary to attain the NAAQS. 42 U.S.C. §§ 7501-7515 (1995). Additionally, the power that Section 202(i) of the CAA gives EPA to increase the stringency of the emission limits on new cars and light duty trucks is available only if EPA determines that there is a "need for further reductions in emissions in order to attain or maintain" the NAAQS. 42 U.S.C. §§ 7521(i)(2)(A), (i)(3)(B)(i) (1994). Fortunately for the nation and unfortunately for EPA's power, there is, in EPA's words, "dramatic improvement" in air quality.[10] According to EPA's own data, the bulk of the nation's people live in areas in attainment with the current NAAQS.[11] Even as to the most widely violated of

---

[10] EPA, *Latest Findings on National Air Quality: 1999 Status and Trends* (Aug. 2000), available at <http://www.epa.gov/airtrends/>, at 5.

[11] The number of people living in counties with air quality concentrations above the level of the current NAAQS in 1999 is

the current NAAQS, that for ozone, EPA foresees increasing compliance. In promulgating the strengthened ozone standard at issue in this case, EPA identified only nine areas predicted to be in violation of the current NAAQS. "Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule" (July 16, 1997) at 4-58.[12] With the strengthened NAAQS, EPA would renew its waning power by increasing the scope and the gravity of nonattainment.

While the EPA's institutional imperatives have changed since the 1970s, the language and meaning of Section 109 of the CAA have not. It still requires the EPA to gear the primary ambients standards to protect public health. The EPA departed from its public health roots not only by ignoring the significance of risk, but also by refusing to ever consider that reducing ozone will increase the incidence of skin cancer.[13] Caught out on a limb by the Court of Appeals, the agency attempted to crawl back. It did not apply for certiorari on whether it could ignore the beneficial effects of ozone. Rather, to

---

as follows: carbon monoxide: 9.1 million; lead: .4 million; nitrogen dioxide: zero; ozone: 53.8 million; particulate matter: 20.3 million; sulfur oxides: zero. *Id.*

[12] An earlier, more specific analysis by the EPA identified only thirty-four counties that would be in nonattainment in 2007. Regulatory Impact Analysis for Proposed Ozone National Ambient Air Quality Standard (Draft, Dec. 1996) at VI-6. Most of these areas were predicted to be in only " 'marginal' nonattainment." *Id.*

[13] *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027, 1051 (1999).

cover its trail of boundless discretion it now claims that it applied something like a standard of significance all along. *See* note 4, *supra*. This post-hoc rationalization cannot save a rulemaking based upon another interpretation of the statute, which is incorrect and violates the delegation doctrine. *Id.*

Sen. Muskie made clear his belief that the statute should be interpreted to avoid delegation problems. As he stated in 1970, "We have an obligation to lay down the standards." 1 *Legislative History of the Clean Air Act Amendments of 1970* at 232 (Senate Debates on S. 4358, Sept. 21, 1970) (statement of Sen. Muskie). He later elaborated:

> Often the statutory guidance is so detailed that EPA is left with little room for the exercise of discretion. Nevertheless, since the most detailed air pollution control decisions represented major social, economic, and political choices, the Congress had to be specific; these were the kinds of choices and balancing neither the agencies nor the courts should or probably would have made.

Edmund Muskie & Elliot Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 Maine L. Rev. 163, 168 (1973) (writing about air and water statutes).

The resulting statutory standard, geared to significant risk to health, satisfies this Court's present delegation doctrine. *See Benzene*, 448 U.S. 607 (1980). No doubt such a principle leaves the agency with some leeway, not only in evaluating the scientific evidence, but also in interpreting a standard of significance. But that leeway is cabined by the traditions of public health practice and,

eventually, the agency's prior interpretations. Even those who would read the delegation doctrine aggressively do not require that Congress answer all the questions in advance, but rather provide an understandable benchmark for subsequent application. *See* Schoenbrod, *Power Without Responsibility* 181-85 (1993). Whether Congress should be held to a higher standard, *id.* at ch. 12; Marci A. Hamilton, *Discussions and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, at 537-39 (1994), is a question not presented in this case.

The Court of Appeals panel felt precluded from avoiding the delegation problem by interpreting the statute itself for several reasons. First, the D.C. Circuit had previously interpreted Section 109 to grant the EPA broad discretion on the level at which to set the primary standard. That is no barrier to this Court. Second, the panel believed itself precluded by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), from taking the first step in interpreting the statute. But, Chevron should be no obstacle to the courts interpreting Section 109 of the CAA, where Congress intended not to delegate broad policymaking power. In any event, delegation is a core, structural constitutional principle that precedes the *Chevron* rule.

CONCLUSION

The Administrator's interpretation of Section 109 of the Clean Air Act is on a collision course with the fundamental principles of this Court's delegation doctrine. A

more reasonable interpretation is available, however, which confines the Administrator's discretion as it saves the statute. The language of the Act, the legislative history, and plain common sense lead to the conclusion that "protect public health" means protect it from significant risk, not whatever risk the Administrator is moved to protect. For this reason, the decision below should be AFFIRMED.

Respectfully submitted,

DAVID SCHOENBROD
MARCI A. HAMILTON

*DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2339
(212) 431-9205 (facsimile)
dschoenbrod@nyls.edu

MARCI A. HAMILTON
40 Washington Square South
New York, New York 10012
(212) 992-8824
(212) 995-4659 (facsimile)
hamilton02@aol.com

DEBORAH PAULUS
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7981

**Counsel of Record*

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

(34)

No. 99-1257

In the

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and California Chamber of Commerce

BEST AVAILABLE COPY

30pp

QUESTION PRESENTED

Whether the court of appeals correctly rejected the Environmental Protection Agency's standardless interpretation of Sections 108 and 109 of the Clean Air Act, and remanded for EPA to fashion and apply a proper interpretation of the Act.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Respondents, American Trucking Associations, Inc., *et al.*[1] Counsel for American Trucking Associations and fourteen other parties, as well as the Office of the Solicitor General, have consented by letter to the filing of this brief. Original letters of consent will be lodged with this Court. However, not all parties have responded, necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest organization with thousands of supporters nationwide. Since its establishment in 1973, PLF has researched and litigated a broad spectrum of public interest issues. PLF advocates a balanced approach to agency rule making and believes that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved.

PLF devotes substantial resources to litigation involving environmental issues and becomes involved in cases that raise important public policy considerations that may create significant legal precedents. PLF is a frequent litigant in this Court and believes its public policy perspective in support of rational environmental protection and economic rights will provide a necessary viewpoint on the issues presented in this case.

The California Chamber of Commerce (Chamber) is the largest and most broadly based employer representative in California with a membership base of more than 11,000

---

[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

businesses. These businesses represent every sector of industry—small, medium, and large—and employ roughly 1.9 million people.

The California Chamber of Commerce recognizes the importance of clean air to protect human health and the environment; however, the Chamber has serious concerns about the economic impacts the Environmental Protection Agency's (EPA) revised National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone will have on California businesses. These rules have been promulgated despite the fact that California's air is significantly cleaner than it was 25 years ago and is getting better all the time. In addition, California is already operating under the most stringent air quality rules in the nation which places California businesses at a competitive disadvantage. These rules will only exacerbate this problem.

It will be more expensive for California to implement these rules than other states because of the incremental costs in making further emission reductions. Also, pollution controls like best available control technology, onerous permitting fees, and stringent enforcement practices will make operations more costly and complicated for businesses that are currently in compliance (or "attainment") areas, but will fall into non-compliance (or "nonattainment") areas because of the stricter rules.

Many of the new "nonattainment areas" have no experience in dealing with such stringent regulations, thus many businesses will move to "cleaner" districts or relocate to other states. In California alone, at least three areas will be added as "nonattainment areas" for particulate matter and ten others for ozone. These areas will have to develop plans by a specific date demonstrating how they will meet the new standards. If these areas do not comply, California could lose valuable highway funds. This will translate into job losses and reduced economic opportunities. Higher costs incurred by industries, including aerospace, electronics, energy, and pharmaceuticals, will only discourage new businesses and the expansion of existing facilities. One study predicts that California could lose

over 10,000 jobs. Moreover, according to the Reason Public Policy Institute, the new standards could cost California $9.1 billion to implement.

The Pacific Legal Foundation and the California Chamber of Commerce are particularly concerned about the unwillingness of EPA to consider impacts on small business and the lower court's determination that EPA must not consider costs and technological feasibility in setting air quality standards. This is particularly troubling because of concerns that the rules are not based on sound science.

According to the National Center for Policy Analysis (NCPA), *Brief Analysis*, No. 236, July 17, 1997, even members of EPA's own Clean Air Scientific Advisory Committee (CASAC) disagree on the need for stricter standards. Although the EPA Administrator claims the science supporting the new rules is indisputable, CASAC was split on what standards to set, if any. Some committee members thought "no standards are justified because there is no clear evidence that setting a standard would yield tangible health benefits." *Id.* at 2. The remaining members of the committee could not agree on whether current standards are too strict or not strict enough. *Id.*

Also, NCPA reports that the public never had an opportunity to review the relevant scientific data because the primary studies used to justify the ozone standards had not been released by the Harvard researchers—not even to the EPA. *Id.* Moreover, there is evidence that the new standards may have an adverse effect on public health and welfare.

Initially, the EPA estimated the new standard for particulate matter alone would save annually more than 40,000 people from premature death. *Id.* But later, the EPA "revealed that this figure is the total number of lives estimated to be saved by *all* clean air regulations." *Id.* Then the EPA claimed that 20,000 lives would be saved per year by the new particulate matter standard—50% less than its original estimate. *Id.* Three months after proposing the standard, "the EPA once again reduced its estimate after an outside researcher found a simple mathematical error in one of [EPA's] key studies." *Id.* "This time the EPA reduced the estimated lives saved by another 25

percent, to 15,000." *Id.* "The discovery of this error has led some analysts to question the EPA's entire statistical analysis." *Id.* It was Dr. Kay Jones, former senior advisor on air quality at the President's Council on Environmental Quality during the Carter administration, who discovered the error. Dr. Jones completely reanalyzed the EPA's estimates and concluded the number is closer to 840 lives saved. *Id.*

Moreover, ground-level ozone has health benefits EPA ignored. Ozone screens out potentially deadly ultraviolet radiation. *Id.* According to the Department of Energy, the required ozone reduction would: (1) "Increase malignant cancers, causing 25 to 50 new deaths a year;" (2) "Cause as many as 260 new cases of cutaneous melanoma and 11,000 new cases of nonmelanoma skin cancer;" and (3) "Cause between 13,000 and 28,000 new incidences of cataracts each year." *Id.*

Some analysts estimate that the revised ozone and PM rules "will eliminate 220,000 jobs and cost the average household about $1,200 per year in discretionary spending." *Id.* According to the American Thoracic Society, poverty is the number one risk factor for asthma; therefore, the new rules "will worsen health by increasing unemployment and lowering household income." *Id.* This is the conclusion of Dr. Wendy Gramm, former administrator of the Office of Regulatory Affairs in the United States Office of Management and Budget (OMB), and Susan Dudley, vice president and director of environmental analysis at Economists, Inc. *Id.* Based on OMB estimates "that for every $9 million to $12 million decline in aggregate personal income one life is lost and EPA cost estimates for the rules, Gramm and Dudley found that the new ozone standard alone could result in 7,000 deaths a year." *Id*

This is the type of balanced analysis the EPA should do, but has not done, to ensure its environmental regulations are reasonable and beneficial. Clearly, this case will set a precedent affecting numerous statutory schemes and literally millions of lives. Regulations that impose bureaucratically defined concepts for safety, environmental protection, or economic relationships must take into account the economic and social costs of those regulations.

For the foregoing reasons, Pacific Legal Foundation and the California Chamber of Commerce move to file a brief amicus curiae in this case.

DATED: September, 2000.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
Pacific Legal Foundation and
California Chamber of Commerce

TABLE OF CONTENTS

Page

QUESTION PRESENTED

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE CLEAN AIR ACT DOES NOT PLAINLY SATISFY THE NONDELEGATION DOCTRINE 5

A. This Case Involves a Sweeping Delegation of Power on a Par with *Schechter* 5

B. Neither the Statute Nor EPA Provide Any Guiding Principles to Determine the Level at Which NAAQS Must Be Set 7

C. Because of a Lack of Guiding Principles the EPA Acted Arbitrarily in Setting NAAQS for Ozone and Particulate Matter 9

II. THIS COURT SHOULD READ THE STATUTE TO AVOID A CONSTITUTIONAL ISSUE 11

III. AN INTELLIGIBLE PRINCIPLE CAN BE EXTRACTED FROM SECTION 109 OF THE CLEAN AIR ACT THAT CHANNELS THE EPA'S DECISION MAKING 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 5

American Trucking Associations v. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999) 1

Califano v. Yamasaki, 442 U.S. 682 (1979) 15-16

City of Amsterdam v. Helsby, 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290 (1975) 7

Greene v. McElroy, 360 U.S. 474 (1959) 13-14

Loving v. United States, 517 U.S. 748 (1996) 12

Mistretta v. United States, 488 U.S. 361 (1989) .. 12-13, 15

Natural Resources Defense Council v. Environmental Protection Agency, 824 F.2d 1147 (D.C. Cir. 1987) 19

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 5

Statutes and Regulations

42 U.S.C. § 7408(a)(1)(A) 1

§§ 7408-09. 1

§ 7409(b) 1

62 Fed. Reg. 38,688 (1997) 12

Miscellaneous

Association of Particulate Matter Components with Daily Mortality and Morbidity in Urban Populations, Part II, Sensitivity Analysis, Research Report 95, Health Effects Institute, 236 (August 2000) 11

Kenneth Culp Davis, *Administrative Law Treatise* 176 (Second Printing 1979) 5-6, 17-18

TABLE OF AUTHORITIES—Continued

Page

Kenneth Culp Davis, *Administrative Law Treatise* 211 (Second Printing 1979) 17

Michael Richard Dimino, *D.C. Circuit Revives Nondelegation Doctrine . . . Or Does It?*, 23 Harv. J.L. & Pub. Pol'y 594 (Spring 2000) 7

STATEMENT OF THE CASE

The Clean Air Act sets up a scheme to regulate air pollutants the "emissions of which, in [the Administrator's] judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The Administrator must publish "air quality criteria" for these pollutants and establish national ambient air quality standards (NAAQS) based on these criteria. *See id.* §§ 7408-09. The standards are of two types—"primary" and "secondary." A "primary" standard indicates a concentration level "requisite to protect the public health" with an "adequate margin of safety." Whereas a "secondary" standard indicates a concentration level "requisite to protect the public welfare." *Id.* § 7409(b).

On July 18, 1997, the Environmental Protection Agency (EPA) adopted new, stricter national ambient air quality standards for ground-level ozone (smog) and particulate matter (soot). Public outcry over the severity of these standards resulted in congressional oversight hearings and scores of suits from industry, states, and other parties challenging the legality of the standards. Among others, the grounds for suit included an argument that the EPA construed Sections 108 and 109 of the Clean Air Act "so loosely as to render them unconstitutional." *American Trucking Associations v. Environmental Protection Agency*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*ATA*). The Court of Appeals agreed:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM [particulate matter] are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S.Ct. 348 (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and

> weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

ATA, 175 F.3d at 1034.

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, or pollutants that have some possibility of adverse health effects at any level above zero. Thus, the court found EPA's explanations for choosing one standard over another amounted to nothing more than assertions that stricter standards mean less pollution and less harm while less strict standards mean more pollution and more harm. According to the court:

> Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

Id. at 1035.

Another ground for suit was the claim that the EPA must consider costs, technological feasibility, and other nonhealth factors in setting the ozone and PM standards. However, the court rejected this claim. Specifically, with respect to costs, the court held: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. *See Lead Industries*, 647 F.2d [1130,] 1148 (DC Cir. 1980)." *Id.* at 1040.

The court also rejected the argument that EPA erred in failing to consider detrimental health effects that are traceable to the cost of complying with the revised national ambient air quality standards. Citing a previous decision in the D.C. Circuit, the court held "it is only health effects relating to pollutants in the air that EPA may consider." *Id.* at 1041.

Nevertheless, the court did hold that EPA must consider not only the maleficent effects of a pollutant but also the beneficent effects. The court observed that the presence of ground-level ozone causes respiratory problems in some people but it also shields people from the deleterious effects of ultraviolet radiation that can cause certain forms of cancer. *Id.* at 1052.

Ultimately, the court determined that the standards not only violated the nondelegation principle but that the ozone standard could not be enforced due to restrictions in other provisions of the Clean Air Act. The court also invalidated the PM standard as arbitrary and remanded to the agency to select a new standard.

Both sides filed petitions for writ of certiorari in this Court. The EPA sought review of the nondelegation determination, among other things, while the opposing parties sought review of the scope of Section 109. Review was granted in both instances and separate briefing is required in each case. This case deals with the delegation issue.

SUMMARY OF THE ARGUMENT

Contrary to the claims of Petitioners, Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. Rather, the nondelegation doctrine is not satisfied because the authority granted EPA under the Clean Air Act is as sweeping as that struck down by this Court in *Schechter*. In addition, neither the EPA nor the Clean Air Act provide the Administrator with an "intelligible principle" to channel her discretion in setting NAAQS. And, as the court below found, because of a lack of a guiding principle, the Administrator acted arbitrarily when she adopted emissions standards for ozone and particulate matter.

However, to avoid the harsh remedy of invalidating the Clean Air Act, or one of its provisions, this Court should adopt a construction of the Act that avoids the constitutional conflict. In both *Greene* and *Yamasaki*, this Court "assumed that Congress intended" to afford those affected by the agency action certain constitutional safeguards. This Court read into

the statute or law a construction that avoided a constitutional issue. This rationale applies equally to the nondelegation doctrine. This Court should assume, as it did in *Greene* and *Yamasaki*, that, whether the statute expressly states so or not, Congress intended EPA to apply the Clean Air Act in a manner that would not allow EPA unfettered discretion to usurp the role of Congress in making the basic policy choices covered by the law. Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action. Therefore, Section 109 of the Clean Air Act requires the Administrator of the EPA to base her decisions on clearly articulable standards that demonstrate for the court that EPA is acting consistent with the will of Congress.

The court below believed an "intelligible principle" could be extracted from Section 109 of the Clean Air Act and even suggested some possibilities. One approach suggested by the court, the most practical approach, would involve a cost-benefit analysis. However, the court argued this approach was precluded by the cases in the D.C. Circuit that held EPA may not consider nonhealth factors in setting NAAQS. But these cases are wrong. They don't adequately account for the plain text of the Act that requires EPA to set emission standards with an "adequate margin of safety." Where a pollutant, such as ozone or particulate matter, poses a health risk at any level above zero, the EPA must consider nonhealth factors, including cost. For these reasons, this Court should require EPA to identify determinate and binding principles to guide the Administrator's decision making as to the level of emissions required to protect public health and safety and declare, as a matter of law, that cost-benefit analysis is such a principle.

ARGUMENT

Petitioners claim that "[b]ecause Section 109 [of the Clean Air Act] plainly satisfies the nondelegation doctrine, there is no need to consider . . . whether EPA should have read Section 109 more narrowly to avoid a constitutional issue." Brief for the Petitioners at 26 n.20. But Petitioners are wrong. Section 109, at least as interpreted by EPA, does not plainly satisfy the

nondelegation doctrine; therefore, this Court should read the statute to avoid a constitutional issue.

I

THE CLEAN AIR ACT DOES NOT PLAINLY SATISFY THE NONDELEGATION DOCTRINE

The nondelegation doctrine is not satisfied in this case because (1) EPA exercises unprecedented power through the Clean Air Act; (2) neither the statute nor EPA provide any guiding principles for determining the level at which emission standards must be set; and (3) because of a lack of guiding principles, EPA has acted arbitrarily in setting NAAQS for ozone and particulate matter.

A. This Case Involves a Sweeping Delegation of Power on a Par with *Schechter*

In noting that this Court has only twice struck down a statute based on nondelegation—*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—Kenneth Davis argues that the key may lie in the scope of the challenged law. As to the *Panama* case, "parts of the Act provided for 'delegation running riot.' " Kenneth Culp Davis, *Administrative Law Treatise* 176 (Second Printing 1979). And,

> [t]he *Schechter* case involved the most sweeping congressional delegation of all time. True, the standards, in the sense of the statutory phrases expressing policy, were the same as those in the *Panama* case–the statements in Title I of the National Industrial Recovery Act. But the delegation was not merely of a small power to determine whether and when a prescribed provision should become effective; the delegation included power to approve detailed codes to govern all business subject to federal authority. Not the vagueness of all the standards but the scope of the delegation distinguishes the *Schechter* case from all others. The Court's opinion is devoted mainly to discussion of standards, but the court did declare: "In view of the

> scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Id.

This case involves a similarly sweeping delegation. To meet its statutory mandate to establish NAAQS "requisite to protect the public health" with an "adequate margin of safety," the court below acknowledged that EPA could eradicate health risks by setting emission limits to zero, even if it meant dismantling the industrial state:

> A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from pollutants, as opposed to risks from the concomitant poverty). First, PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero. *See* PM [EPA] Staff Paper at IV-1. Second, the combustion associated with pastoral life appears to be rather deadly. *See* World Bank, *World Development Report 1992: Development and the Environment 52* (1992) (noting that "biomass" fuels (i.e., wood, straw, or dung) are often the only fuels that "poor households, mostly in rural areas" can obtain or afford, and that indoor smoke from biomass burning "contributes to acute respiratory infections that cause an estimated 4 million deaths annually among infants and children").

ATA, 175 F.3d at 1038 n.4.

Likewise, in his article critiquing the case at bar, Michael Dimino alludes to the broad scope of agency power under the Clean Air Act and concludes:

> [T]he delegation to the EPA in the Clean Air Act authorizes the EPA to balance public health against the entire industrial economy. This exceeds any delegation of authority previously upheld under Article I.

Michael Richard Dimino, *D.C. Circuit Revives Nondelegation Doctrine . . . Or Does It?*, 23 Harv. J.L. & Pub. Pol'y 594 (Spring 2000). *See also City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290, 299 (1975) ("the desideratum should be safeguards proportionate to the grant; the larger the grant, the greater the safeguards required").

Thus without some intelligible principle to guide the Administrator's broad discretion under Section 109, the Clean Air Act—much like the statutory provisions involved in *Panama* and *Schechter*—does not plainly satisfy the nondelegation doctrine.

B. Neither the Statute Nor EPA Provide Any Guiding Principles to Determine the Level at Which NAAQS Must Be Set

What the court below found most troubling about the standard-setting process under Section 109 of the Clean Air Act was the Administrator's failure to articulate an "intelligible principle" to channel her consideration of the various factors she must weigh in setting NAAQS. *See ATA*, 175 F.3d at 1034. "The nondelegation doctrine," the court concluded, "requires such a principle." *Id.* As the court explained:

> Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

Id.

Although the court approved the factors the Administrator considers to establish NAAQS, such as the severity of effect, certainty of effect, and size of population affected, the court

believed these considerations did not go far enough in defining an acceptable level of risk.

> These criteria, long ago approved by the judiciary, *see Lead Industries Ass'n v. EPA*, 208 U.S. App. D.C. 1, 647, F.2d 1130, 1161 (D.C. Cir. 1980) ("*Lead Industries*"), do not themselves speak to the issue of degree.

ATA, 175 F.3d at 1035.

As the court points out, EPA is given to defending its decision not to adopt a more severe emission limit on the basis that there is greater uncertainty about health effects at the lower levels. In this case, for example, EPA claims it is inappropriate to reduce the ozone standard from 0.08 to 0.07 ppm because the more serious effects are less certain at the lower limit and the lower limit is closer to background levels. *Id.* at 1036. But, the court correctly observes that "the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much." *Id.* After all, the same could be said for the 0.08 ppm level as for the 0.07 ppm level. 0.08 ppm has less certain health effects than 0.09 ppm and it is closer to background levels too. The principle EPA invokes to set each level of emissions is, according to the court, simply that it is "possible, but not certain" that health effects exist at that level. *ATA*, 175 F.2d at 1036. But this principle could just as easily justify a standard of zero. *Id.*

In this case, EPA has provided no limiting principle, nor pointed to such a principle in the statute. Rather, EPA's explanations for its ozone and particulate matter standards amount to mere assertions

> that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public

> health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

Id. at 1035.

The result of the EPA's indefinite approach to setting NAAQS is that the Administrator is "free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog," whereby 4,000 deaths in one week are attributed to high levels of soot in the air. *Id.* at 1037. Thus, in the absence of an intelligible principle to guide the Administrator in setting NAAQS, the statute does not plainly satisfy the nondelegation doctrine.

C. Because of a Lack of Guiding Principles the EPA Acted Arbitrarily in Setting NAAQS for Ozone and Particulate Matter

In support of their claim that the Administrator is cabined by strict standards, Petitioners recite the complexity of the Clean Air Act, the opportunity for public input and the specific criteria that the Administrator must consider to set NAAQS. *See* Brief for the Petitioners at 24-25. But these factors do not go to the crucial question of degree (critical to the court below). Nor do they constitute a meaningful guide for, or constraint on, agency rule making as evidenced by the EPA's arbitrary adoption of ozone and particulate matter standards in this case. The court below had good cause to find the Administrator acted capriciously and remand the rules back to the agency for reconsideration and adoption of determinate and binding standards.

Although Petitioners imply the experts the Administrator consulted were supportive of her adoption of the 0.08 ppm ozone standard, nothing could be further from the truth. Section 109(d) of the Act establishes the Clean Air Scientific Advisory Committee or CASAC. This eminent scientific committee reviews the evidence on which the Administrator relies and makes recommendations for NAAQS. With respect to the ozone standard, however, the advisory committee was unable to make a scientific recommendation. Citing lack of conclusive studies and the fact that ozone is a nonthreshold pollutant that could have adverse health effects at any

concentration, the committee acknowledged the selection of an ozone standard above zero must be a matter of policy rather than science. Thus, the CASAC members offered only what they termed "personal preferences." Four experts favored an ozone standard of at least 0.09 ppm, whereas three experts favored 0.08 ppm, and one expert favored a range of 0.08-0.09 ppm. *See* Brief for Cross-Petitioners (related case 99-1426) at 7. The court below rejected the CASAC "recommendations" as baseless. *ATA*, 175 F.3d at 1035-36.

Moreover, the EPA refused to allow CASAC to review scientific literature that showed the positive health effects of ground-level ozone. Brief for Cross-Petitioners at 8. The United States Department of Energy sought to impress the importance of this literature on CASAC with testimony that the ozone standard proposed by the Administrator would produce approximately 2,000 to 11,000 additional cases of skin cancer per year, including 25 to 30 deaths per year, and 28,000 additional cases of cataracts annually. *Id.* at 9. The Office of Management and Budget also concluded that the adverse effects of the Administrator's ozone standard would be comparable in magnitude to the positive effects of the standard. *Id.* CASAC members expressed an interest in reviewing the literature on this subject and "EPA conceded that DOE's concern 'could be big,'" but the Administrator prohibited a consideration of the data. *Id.* This crabbed view of what the Clean Air Act required caused the circuit court to opine:

> [I]t seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only half of a substance's health effects in determining the maximum level of that substance.

ATA, 175 F.3d at 1052.

Scientific support for the EPA's particulate matter standard was no greater than that provided for ozone. CASAC was split on the level of emissions that should be regulated for certain types of particulate matter. With respect to fine particulate matter only two of the twenty-one experts on the advisory committee endorsed the standard proposed by the

Administrator while eight experts opposed any such standard. Brief for Cross-Petitioners at 15. According to the CASAC report, those in opposition "'were influenced, to varying degrees, by the many unanswered questions and uncertainties regarding the issue of causality,'" particularly the inconclusiveness of epidemiological studies on which the Administrator relied. *Id.*

Moreover, these epidemiological studies were not made available for public review and comment. Only after the regulations had been adopted and Congress demanded a review of the data did EPA submit the data to the Health Effects Institute (HEI) for re-analysis. HEI only recently released the results of its study, about three years after the EPA finalized its regulations. While EPA claims the data prove that particulate matter in the air is responsible for thousands of deaths each year, justifying onerous regulations and billions in costs, HEI was considerably less certain. The institute guardedly concluded: "[I]t is important to bear in mind that the results of our reanalysis alone are insufficient to identify causal relations with mortality." *Association of Particulate Matter Components with Daily Mortality and Morbidity in Urban Populations*, Part II, Sensitivity Analysis, Research Report 95, Health Effects Institute, 236 (August 2000).

Contrary to Petitioners' assertions, the statutory and administrative standards that apply to NAAQS do not cabin the discretion of the Administrator. To the contrary, her arbitrary selection of emission limits for ozone and particulate matter in this case demonstrates, as the lower court concluded, the danger inherent in a rule-making process that is not guided by a specific and intelligible principle. Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. Therefore, this Court should read the statute to avoid a constitutional conflict.

II

THIS COURT SHOULD READ THE STATUTE TO AVOID A CONSTITUTIONAL ISSUE

Petitioners recognize that the nondelegation doctrine is "'rooted in the principle of separation of powers.'" Brief for

Petitioners at 21 (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)). They also recognize that "'[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., art. I, § 1, and may not be conveyed to another branch or entity.' " Brief for Petitioners at 21 (quoting *Loving v. United States*, 517 U.S. 748, 758 (1996)). Nevertheless, the EPA Administrator asserts she may set National Ambient Air Quality Standards pursuant to her own policy preferences without pointing to any guiding principles to avert arbitrary decision making. According to the Administrator, the selection of NAAQS is "largely judgmental in nature" and she is obliged to follow "no generalized paradigm." 62 Fed. Reg. 38,688 (1997) (to be codified at 40 C.F.R. pt. 50).

Petitioners hold in disdain the lower court's determination that the Administrator must establish a "'determinate criterion for drawing lines' " and suggest such a standard is contrary to the purpose of the nondelegation doctrine and requires EPA to "supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the 'right' level." Brief for the Petitioners at 26-27. But this hyperbolic reading of the decision below is inaccurate both as to the court's holding and the result of that holding.

The D.C. Circuit did not require EPA to set a "single principle" to control NAAQS or to satisfy the court's subjective belief as to the "right level" of emissions. Rather, the court directed EPA to develop "determinate, binding standards for itself" to reduce the likelihood that the Administrator will "exercise the delegated authority arbitrarily" and to "enhance the likelihood that meaningful judicial review will prove feasible." *ATA*, 175 F.3d at 1038. This is in full harmony with the purposes of the nondelegation doctrine and the precedents of this Court. This Court has said:

> Only if we could say that there is an absence of standards for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose
>
> . . . .

Mistretta, 488 U.S. at 379 (quoting *Yakus*, 321 U.S. at 425-26).

The "absence of standards for the guidance of . . . [agency] action" is apparent in this case. Under EPA's interpretation of the Clean Air Act, it is impossible for a court to determine whether the will of Congress has been obeyed. This is a clear violation of the nondelegation doctrine which would require overriding the statute. However, as the court below observed, the harsh result of invalidating the Act can be avoided by proper statutory construction—a construction that recognizes Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action.

Consider the case of *Greene v. McElroy*, 360 U.S. 474 (1959). In that case, this Court considered whether the President or Congress had delegated to the Department of Defense, in an industrial security program, the authority to deny an individual the opportunity to follow his chosen private profession without the safeguard of a fair hearing. The petitioner was general manager of a private corporation that developed for the Armed Forces goods involving military secrets. Under regulations adopted by the Secretary of Defense, petitioner was denied security clearance without access to adverse information or an opportunity to cross-examine witnesses that allegedly established his Communistic sympathies. Consequently, petitioner was fired and he was unable to obtain employment elsewhere. Petitioner sued claiming the revocation of his security clearance was unlawful.

The Secretary argued that the President has inherent authority to maintain military secrets inviolate and that a statutory grant of authority to revoke a security clearance without a full hearing may be inferred from congressional legislation dealing with the armed services. *Id.* at 495. However, this Court reframed the question:

> But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program.

Id. at 496.

After a recitation of certain principles that "have remained relatively immutable" in this Court's jurisprudence, such as the right to confront one's accusers, this Court found that neither the President nor Congress had expressly delegated to the Secretary authority to deprive a private contractor of his security clearance without a full evidentiary hearing. An explicit statement, this Court held, is constitutionally required.

> [I]t must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.

Id. at 507.

And further,

> [t]hey must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters v. Hobby*, supra, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Id.

However, this Court concluded that where administrative action raises serious constitutional questions, this "Court has assumed that Congress or the President intended to afford those affected by the action" traditional constitutional safeguards. *Id.* That is, this Court assumed a statutory construction that avoided a constitutional conflict, and read into the law a requirement for a fair hearing.

This reasoning is applicable to the case at bar. Like *Greene*, this case raises serious constitutional questions about congressionally delegated authority. As immutable as the right to confront one's accusers is the bedrock principle of separation of powers that is upheld by the nondelegation doctrine inherent in Article I. Indeed, as this Court has noted, the nondelegation doctrine is "rooted in the principle of separation of powers." *Mistretta v. United States*, 488 U.S. at 371. Thus, this Court may assume that Congress intended to afford those affected by the Clean Air Act the traditional constitutional safeguard of a legitimate delegation of power.

In *Greene*, this Court found a hearing is statutorily required for revocation of security clearance although no statute specifically required such. Likewise, this Court should find a requirement for a guiding principle in the establishment of NAAQS under the Clean Air Act.

This Court's decision in *Califano v. Yamasaki*, 442 U.S. 682 (1979), which relied on *Greene*, further illustrates this point. *Yamasaki* involved a question of procedure under the Social Security Act. Section 204 of the Act authorized the government to recoup overpayments of social security benefits by adjusting future payments. The normal practice allowed the Secretary of the Department of Health, Education, and Welfare to make an *ex parte* determination of overpayment. Only after that determination would the recipient have an opportunity for an oral hearing, if the recipient requested it.

This Court found no express provision in the Act requiring a prerecoupment hearing. However, to avoid a constitutional conflict, this Court assumed that such a hearing is *statutorily* required.

> Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality, *see Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result), counsels against unnecessary constitutional adjudication. And if "a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), a court should adopt that construction. *In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary*. See *Greene v. McElroy*, 360 U.S. 474, 507-508 (1959).

Yamasaki, 442 U.S. at 692-93 (emphasis added; brackets in original).

Thus, this Court read into Section 204 of the Social Security Act a requirement of constitutional regularity that provided traditional safeguards but avoided the harsh remedy of invalidating the statute or one of its provisions. This rationale applies equally to the nondelegation doctrine. This Court should assume, as it did in *Greene* and *Yamasaki*, that whether the law expressly states so or not, Congress intended the Clean Air Act to be administered by EPA in a manner that would not allow EPA unbridled administrative discretion so as to usurp the role of Congress in making the basic policy choices covered by the law. Congress intended, and the Act requires, that EPA adopt an "intelligible principle" that upholds the balance of power in our system of government and deters arbitrary agency action. Therefore, Section 109 of the Clean Air Act requires the Administrator of the EPA to base her decisions on clearly articulable standards that demonstrate for the court that EPA is acting consistent with the will of Congress.

III

AN INTELLIGIBLE PRINCIPLE CAN BE EXTRACTED FROM SECTION 109 OF THE CLEAN AIR ACT THAT CHANNELS THE EPA'S DECISION MAKING

Although the lower court found that EPA's interpretation of the Clean Air Act violated the nondelegation doctrine, the court remanded the case to the agency rather than invalidate the statute.

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. Lockout/Tagout I, 938 F.2d at 1313.

ATA, 175 F.3d at 1038.

Remand, the court said, serves the rationales of the nondelegation doctrine of reducing the likelihood that the agency will "exercise the delegated authority arbitrarily" and enhancing "the likelihood that meaningful judicial review will prove feasible." *Id.*

Although the court acknowledged the difficulties inherent in articulating an intelligible principle that will guide the Administrator in setting the level of emissions for NAAQS, the court was optimistic that EPA could find such a principle. Kenneth Davis is equally optimistic:

> The weakness of a judicial requirement of *statutory* standards is that legislators are often unable or unwilling to supply them. The strength of a judicial requirement of *administrative* standards is that, with the right kind of judicial prodding, the administrators can be expected to supply them.

Kenneth Culp Davis, *Administrative Law Treatise* 211 (Second Printing 1979).

The lower court even offered some suggestions. For example, the court seemed to approve a standard suggested by the dissent that emission limits reflect controllable human activity and not uncontrollable natural levels. The problem in this case was that the EPA never suggested it.

> EPA's language, coupled with the data on background ozone levels, may add up to a backhanded way of saying that, given the national character of NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively *extracting* chemicals from nature. That may well be a sound reading of the statute, but EPA has not explicitly adopted it.

ATA, 175 F.3d at 1027, 1036.

The court suggested the familiar "more probable than not" criterion might be appropriate in some cases and even recommended EPA take a close look at the standards utilized by the State of Oregon (which the court discussed at length) in establishing its health plan for the poor. *Id.* at 1039.

But the most practical standard the court suggested for an "intelligible principle" is a cost-benefit analysis. *Id.* at 1038. This approach would address the concerns of Respondents and avoid a constitutional conflict. The only problem the court found with this approach is the circuit's own cases that interpret Section 109 to bar EPA from considering any nonhealth factors in setting NAAQS. However, these cases are wrong.

As we argued in the companion case (99-1426) to this case, Section 109 of the Clean Air Act requires the EPA to set ambient air quality standards to protect public health and welfare, but with "an adequate margin of safety." That term implies discretion and requires the EPA to consider nonhealth factors. In interpreting a similar term under Section 112, that requires the EPA to set standards for hazardous pollutants with "an ample margin of safety," the D.C. Circuit Court of Appeals determined that term does not preclude the EPA from considering costs, technological feasibility, or other nonhealth

factors. *See Natural Resources Defense Council v. Environmental Protection Agency*, 824 F.2d 1147 (D.C. Cir. 1987) (*Vinyl Chloride)*. Rather, the court determined the text of the statute granted considerable discretion to the EPA to set emission standards and that such discretion is necessary because of the scientific uncertainty associated with determining a safe level of exposure for substances for which there may be no "risk-free" limit. The court held that a determination of what is "safe" must be made only with a consideration of health-related factors, but that the EPA had wide latitude in what it could consider to set the appropriate margin of safety.

The language of Section 109 is almost identical to the language of Section 112. Therefore, the term "adequate margin of safety" should be understood to mean, as with Section 112, that EPA can consider nonhealth factors in setting NAAQS. In fact, since ozone and particulate matter are considered "nonthreshold" substances—substances that may affect health at any exposure level above zero—it would be hard to credit how the EPA could set an "adequate margin of safety," except at zero emissions, without a consideration of nonhealth factors.

For these reasons, this Court should determine that EPA must extract an "intelligible principle" from Section 109 of the Clean Air Act to channel its decision making and that a cost-benefit analysis is, as a matter of law, such a principle.

CONCLUSION

Section 109 of the Clean Air Act does not plainly satisfy the nondelegation doctrine. To the contrary, without an "intelligible principle" by which to measure the level of risk, the Act plainly violates the nondelegation doctrine. However, this Court can avoid a constitutional conflict by assuming, as it has in other cases, that Congress intended the EPA to apply the Clean Air Act in a constitutional manner; that is, with some

"intelligible principle" that would avert arbitrary agency action. Such a principle is the cost-benefit analysis. The Act does not preclude such analysis. It requires it.

DATED: September, 2000.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae
Pacific Legal Foundation and
California Chamber of Commerce

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

35

No. 99-1257

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF FOR THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ARTHUR ANDERSEN LLP, DELOITTE & TOUCHE LLP, AND KPMG LLP AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MARK A. PERRY
BRIAN C. GOEBEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

September 11, 2000

BEST AVAILABLE COPY

24 pp

QUESTION PRESENTED

Whether, under the nondelegation doctrine, an agency's authority to make significant policy decisions, such as those imposing substantial regulatory compliance costs on a profession or industry, subjecting it to unprecedented federal regulation, or curtailing constitutionally protected liberties, must be grounded upon a clear statement by Congress that it has delegated such authority to the agency.

TABLE OF CONTENTS

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES..... iv
INTEREST OF AMICI CURIAE..... 1
STATEMENT..... 3
SUMMARY OF ARGUMENT..... 4
ARGUMENT..... 5
CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 6

American Trucking Ass'ns, Inc. v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999) ..... *passim*

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 11

EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) 12

FDA v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) 15, 17

FPC v. *New England Power Co.*, 415 U.S. 345 (1974) 9

Garcia v. *San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) 13

Greene v. *McElroy*, 360 U.S. 474 (1959) 8

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 11, 13

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) ..... *passim*

International Union, UAW v. *OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) 4

Kent v. *Dulles*, 357 U.S. 116 (1958) 8, 12

Landgraf v. *USI Film Products*, 511 U.S. 244 (1994) 12

MCI Telecommunications Corp. v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994) 14, 15, 17

Mistretta v. *United States*, 488 U.S. 361 (1989) 6, 14

National Cable Television Ass'n, Inc. v. *United States*, 415 U.S. 336 (1974) 9, 10, 17

Panama Refining Co. v. *Ryan*, 293 U.S. 388 (1935) 5, 6

Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 7, 9

United States v. *Bass*, 404 U.S. 336 (1971) 11

Constitution, Statutes and Regulations

U.S. Const. Art. I, § 1 5

42 U.S.C. § 7408 3

42 U.S.C. § 7409 ..... 3, 18

62 Fed. Reg. 38,652 (1997) 3

62 Fed. Reg. 38,856 (1997) 3

65 Fed. Reg. 43,148 (2000) 2, 16, 17, 18

Other Authorities

Tribe, *American Constitutional Law* (2d ed. 1988) 13

IN THE

Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF FOR THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ARTHUR ANDERSEN LLP, DELOITTE & TOUCHE LLP, AND KPMG LLP AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE[1]

The American Institute of Certified Public Accountants is the national professional organization for all Certified Public Accountants. Its mission is to provide members with the resources, information, and leadership that enable them to provide valuable services in the

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief in letters that have been lodged with the Clerk.

highest professional manner to benefit the public as well as employers and clients. In fulfilling its mission, the AICPA works with state CPA organizations and gives priority to those areas where public reliance on CPA skills is most significant.

Arthur Andersen LLP is one of the "Big 5" accounting firms, with more than 70,000 employees in 83 countries. Arthur Andersen's mission is to build relationships and develop innovative solutions to help dynamic people and organizations create and realize value. Deloitte & Touche LLP, another Big 5 firm, is part of Deloitte Touche Tohmatsu, one of the world's leading professional services firms, with more than 90,000 people in over 130 countries. Deloitte & Touche creates solutions to business problems based on a thorough grasp of each client's needs. KPMG LLP, also a Big 5 accounting firm, is the U.S. member of KPMG International, which has more than 100,000 professionals in member firms in 159 countries. KPMG helps clients successfully respond to changing opportunities by providing professional services that enhance operational and financial performance.

Amici curiae are confronted with a rulemaking proceeding by the Securities and Exchange Commission that has the potential to work fundamental changes in the accounting profession by introducing new and sweeping federal regulation of professional services firms. *See* 65 Fed. Reg. 43,148 (2000). This rulemaking raises issues under the nondelegation doctrine that parallel those in this case. *Amici* have a vital and enduring interest in ensuring that federal administrative agencies do not exceed the authority constitutionally delegated to them by Congress.

STATEMENT

The Clean Air Act ("CAA") requires the Environmental Protection Agency ("EPA") to promulgate and periodically revise national ambient air quality standards for certain pollutants. *See* 42 U.S.C. §§ 7408-09. For each pollutant, the EPA sets a primary and secondary standard. *See* § 7409(b). In 1997, the EPA issued final rules revising the primary and secondary standards for ozone and particulate matter ("PM"). *See* 62 Fed. Reg. 38,652 (1997); 62 Fed. Reg. 38,856 (1997). Numerous petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit challenging the validity of the final rules. *See American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999). These petitioners charged, *inter alia*, that the authority claimed by the EPA under the CAA is inconsistent with the Court's nondelegation doctrine and the separation of powers principles that it preserves.

The court of appeals concluded that the EPA's construction of the CAA violated the nondelegation doctrine because the agency failed to articulate an intelligible principle "to channel its application" of the statutory factors it was required to consider when revising the primary and secondary standards for ozone and PM. *Id.* at 1034. The court of appeals did not strike down the CAA as unconstitutional, but rather held that the air quality standards could not be enforced and remanded the matter to the EPA to develop an interpretation of the CAA that would confine its discretion within constitutional bounds when setting air quality standards. *See id.* at 1038.

In reaching the issue of whether the EPA's interpretation of the CAA violated the nondelegation doctrine,

the court of appeals did not apply its previous teaching that, under the nondelegation doctrine, federal courts "require a clear statement by Congress that it intended to test the constitutional waters" in cases involving broad delegations of policymaking authority to administrative agencies. *See International Union, UAW* v. *OSHA*, 938 F.2d 1310, 1316-17 (D.C. Cir. 1991). The court of appeals did not rely on this clear statement rule even though it found that the "latitude [claimed by the] EPA . . . [was] seem[ingly] even broader than that OSHA asserted in *International Union*" and provided the EPA with the authority to "send industry not just to the brink of ruin but hurtling over it." 175 F.3d at 1037. Application of the clear statement rule in this case would have provided an alternative ground to reach the same result, while avoiding the difficult constitutional question that the court of appeals addressed pursuant to the nondelegation doctrine.

SUMMARY OF ARGUMENT

The Court should explicitly incorporate a clear statement requirement into the nondelegation doctrine as a constitutionally required check on sweeping assertions of power by federal agencies—including the Securities and Exchange Commission, which is attempting to assert unprecedented power to regulate *amici* and the entire accounting profession.

The Court should adopt a clear statement requirement as an aspect of judicial scrutiny of agency rulemaking pursuant to the nondelegation doctrine for at least three reasons. *First*, the Court has invoked clear statement principles in previous cases involving the nondelegation doctrine. Those principles further the policies underlying the nondelegation doctrine as well as

the judicial practice of deciding constitutional issues only when it is necessary to do so. The reasoning of the Court's prior decisions suggests that a clear statement rule should be expressly incorporated into the nondelegation doctrine. *Second*, the concerns that have led the Court to impose clear statement rules in other legal contexts are also present in cases involving agency claims of broad policymaking authority. Accordingly, the Court should incorporate a clear statement rule into the nondelegation doctrine to address these concerns. *Third*, given the limits of judicial review inherent in the traditional nondelegation doctrine, adopting a clear statement rule as part of that doctrine would further the separation of powers principles underlying the doctrine and would be instrumental in constraining agency behavior. Application of such a clear statement rule requires that the EPA's action in this case be invalidated and the court of appeals' decision be affirmed.

ARGUMENT

Under the separation of powers principles enshrined in the Constitution, the legislative power is assigned to Congress rather than the executive or the judiciary. U.S. Const. Art. I, § 1; *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 675 (1980) ("*Benzene*") (Rehnquist, J., concurring). As a result, it has long been settled that "Congress . . . is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935).

At the same time, the "Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and es-

tablishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply." *Ibid.*; *see also Benzene*, 448 U.S. at 675 (Rehnquist, J., concurring) (stating that "common sense" and "necessit[y]" dictate that Congress must be able to "lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases").

When confronted with a claim that Congress has impermissibly delegated its legislative authority to an administrative agency, the Court has traditionally reviewed the statutory text and context, as well as any applicable legislative history, to determine if there is an "intelligible principle" that confines the agency's discretion and to which the agency must conform when exercising the authority ostensibly granted to it by Congress. *See Benzene*, 448 U.S. at 675-76 (Rehnquist, J., concurring); *Panama Refining*, 293 US. at 429-30. In the absence of such an intelligible principle, a statute constitutes an impermissible delegation of legislative power if it allows the agency rather than Congress to set national policy. *See, e.g., A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. at 433.

This judicial scrutiny of the permissible parameters of agency policymaking authority is referred to as the "nondelegation doctrine." *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (noting that the Court has also relied on the policies underlying the nondelegation doctrine to give "narrow[ing] constructions to [broad] statutory delegations"). This case provides the Court

with an opportunity to refine the contours of the nondelegation doctrine. The Court should use this opportunity to adopt a clear statement rule—a requirement that certain assertions of agency authority be based on a clear delegation of that authority by Congress—as part of that doctrine. In particular, a clear congressional statement should be required to sustain an agency's authority to make a variety of significant policy decisions, such as those imposing highly burdensome regulatory compliance costs on an industry or profession, subjecting an entire industry or profession to unprecedented federal regulation, or curtailing constitutionally protected liberties.[2]

1. To further the policies underlying the nondelegation doctrine, the Court has relied on clear statement principles in previous cases involving the scope of an

---

[2] The adoption of such a clear statement requirement does not mean that the Court should abandon judicial review of congressional delegations of policymaking authority. If Congress has clearly intended to give an agency policymaking authority on a significant issue, then the Court should engage in its traditional nondelegation doctrine analysis. *See Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (stating that even when Congress clearly intends to delegate certain authority to an agency, "any such delegation must also meet the normal requirements of the nondelegation doctrine"). Applying that traditional framework, the Court should carefully review the federal legislation to determine whether Congress has provided the agency with discernable limits on the scope of its delegated authority and, if it has not, whether the absence of such limits is nevertheless justified as a matter of necessity. If the lack of an intelligible principle is not the result of some necessity, then the legislation is unconstitutional. *See Benzene*, 448 U.S. at 671-88 (Rehnquist, J., concurring) (discussing the Court's traditional nondelegation analysis).

agency's authority. The reasoning of these cases suggests that a clear statement rule should be utilized in all nondelegation doctrine cases involving significant policy decisions by agencies.

a. The Court has held that agencies do not have the authority to promulgate regulations curtailing constitutionally protected liberties absent a clear statement by Congress delegating that authority to the agencies. *See Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958). These decisions are based, in part, on the principle that the Court should avoid deciding constitutional questions when it is possible to do so. *See Kent*, 357 U.S. at 130 ("We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.").

These decisions are also based on the separation of powers principles underlying the nondelegation doctrine. In *Greene*, the Court held that a delegation of authority to impede the exercise of a constitutional right "must be made explicitly . . . because [this type of government] action . . . requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene*, 360 U.S. at 507. Thus, by requiring unambiguous evidence of congressional intent to confer significant authority upon an agency, the clear statement rule furthers the fundamental policy underlying the nondelegation doctrine—"ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring).

b. The Court has also recognized that decisions curtailing constitutional liberties are not the only types of "important choices of social policy" that should be made by Congress rather than an agency. As a result, the Court has utilized clear statement principles to resolve challenges to agency efforts to impose significant regulatory compliance costs on entire industries or to exercise unprecedented powers over American businesses.

In cases dealing with administrative costs imposed on the cable television industry and the natural gas industry by federal agencies, for example, the Court has held that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (summarizing *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336 (1974), and *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974)). The Court adopted this clear statement requirement, in part, because the power to impose costs on a regulated industry carries with it the possibility that an agency would use that power to penalize those with whom it disagrees or to impose enormous

economic burdens on the members of that industry. *See National Cable Television Ass'n*, 415 U.S. at 340-42.

Likewise, a plurality of the Court has also recognized that "[i]n the absence of a clear mandate in the [enabling] Act, it is unreasonable to assume that Congress intended to give [an agency] . . . unprecedented power over American industry" or the "power to impose enormous costs" on businesses. *Benzene*, 448 U.S. at 645 (plurality opinion). Accordingly, adopting a clear statement requirement is also an appropriate method of constraining agency efforts to regulate businesses in an unprecedented manner or in a manner that imposes significant regulatory compliance costs on those businesses.

2. The Court has adopted clear statement rules in other areas of the law in response to two principal concerns. First, the Court has required a clear statement of congressional intent in a variety of circumstances to ensure that Congress has explicitly considered the important policy question at issue in the case. As noted above, the nondelegation doctrine also reflects an effort by the Court to ensure that Congress fulfills its constitutional role as a policymaker. Second, in cases involving federal legislation in areas that are traditionally the concern of the states, the Court has adopted a clear statement rule to preserve separation of powers principles that are otherwise difficult to enforce judicially. Like the federalism principles embodied in the Tenth Amendment, the separation of powers principles giving rise to the nondelegation doctrine are not always readily enforceable by the federal courts. Thus, because the concerns that led the Court to adopt clear statement rules in other contexts are also present in the nondelegation context, a

clear statement rule like the one described above should be adopted as part of the nondelegation doctrine.

a. The Court has frequently required Congress to indicate clearly that it intends to alter the balance of power between the federal and state governments through federal legislation. *See, e.g., Gregory* v. *Ashcroft*, 501 U.S. 452, 459-60 (1991) (requiring a clear statement of congressional intent to legislate in "areas traditionally regulated by the States"); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985) (requiring a clear statement of congressional intent to override a State's Eleventh Amendment immunity); *United States* v. *Bass*, 404 U.S. 336 (1971) (requiring a clear statement of intent to transform misconduct that has traditionally been prosecuted by the States into a federal crime). This clear statement rule requires Congress to consider important issues of federalism and separation of powers in the first instance allows federal courts to avoid deciding constitutional issues unnecessarily: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.

Legislation affecting the division of legislative authority between Congress and the administrative state, like legislation raising federalism concerns, raises equally sensitive separation of powers issues. *See, e.g., Benzene*, 448 U.S. at 673-74 (Rehnquist, J., concurring). Accordingly, just as it has done in the area of federalism, the Court should adopt a clear statement rule as part

of the nondelegation doctrine to ensure that Congress explicitly considers not only "important choices of social policy," but also the constitutional concerns that are implicated by delegating to agencies the authority to make those policy choices. In addition, adopting a clear statement rule would allow federal courts to avoid reaching the sensitive separation of powers issues raised by a delegation of policymaking authority on an important question of national policy in cases where Congress has not already considered those issues in the first instance. *Cf. Kent*, 357 U.S. at 130.

b. The Court has also invoked the constitutional principle that Congress is the government branch responsible for making important policy determinations when imposing a clear statement rule in contexts that do not raise federalism concerns. *See Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). In *Landgraf*, the Court required a clear statement of congressional intent concerning the retroactivity of federal legislation because "[r]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments." 511 U.S. at 272-73. Similarly, in *Arabian American Oil*, the Court required a clear statement of congressional intent that a federal law applies extraterritorially in order to assure that Congress has carefully considered the implications of potential conflicts between "our laws and those of other nations." 499 U.S. at 248. Like the rationale for adopting clear statement rules in federalism cases, the

rationale for imposing clear statement rules in other contexts—to ensure that Congress makes fundamental policy decisions—also supports utilizing a clear statement rule as part of the nondelegation doctrine.

c. The Court's decision to impose a clear statement rule in cases involving federal regulation of areas traditionally regulated by the States is based not only on the principle that Congress should make important policy decisions, but also on the Court's recognition that the federalism principles at issue in these cases are not particularly susceptible to judicial enforcement. *See Gregory*, 501 U.S. at 464 (discussing *Garcia* v. *San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)). In *Gregory*, the Court explicitly justified the clear statement rule on this basis: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. 'To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" 501 U.S. at 464 (quoting Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed. 1988)).

Like the federalism principles at issue in *Garcia*, the separation of powers principles underlying the nondelegation doctrine are not always susceptible to judicial enforcement. As Justice Scalia has noted, "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts" because "no statute can be entirely precise . . . and . . .

some judgments, even some judgments involving policy considerations, must be left to the officers executing the law." *Mistretta*, 488 U.S. at 415 (dissenting opinion). Accordingly, just as in the context of federal regulation of traditional areas of state concern, the Court should adopt a clear statement rule as part of the nondelegation doctrine to preserve the separation of powers principles underlying that doctrine.

3. Recognizing a clear statement rule as part of the nondelegation doctrine would further preserve the separation of powers principles upon which the doctrine is based by ensuring that agencies do not overstep their constitutional bounds by exercising policymaking authority over significant issues. Four recent examples of agency aggrandizement, including the EPA's action in this case, illustrate the importance of a clear statement rule in maintaining an appropriate separation of constitutional powers between Congress and the administrative state.

a. Recently, the Federal Communications Commission ("FCC") attempted "to make tariff filing optional for all nondominant long distance carriers" based on its interpretation of its statutory authority to "modify" rate-filing requirements. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 220 (1994). These rate filings were "the essential characteristic of [the] rate-regulated [long-distance common carrier] industry." *Id.* at 231. Accordingly, the Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission

to 'modify' rate-filing requirements." *Id.* In other words, the Court held that it would not find that the agency had the authority to make such a significant policymaking decision absent a clear statement to that effect from Congress.

b. Similarly, the Food and Drug Administration ("FDA") recently attempted to exercise unprecedented power over the tobacco industry based on its interpretation of its statutory authority to regulate "drugs," "devices," and "combination products." *See FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1296-97 (2000). The Court held that the FDA lacked the authority to regulate the tobacco industry because the underlying statute and tobacco-related legislation demonstrated that Congress had specifically precluded such regulation by the agency. *Id.* at 1315. In supporting this conclusion, the Court also noted that a contrary reading of the relevant statutes would be unreasonable because there was no evidence that Congress had expressly delegated the sweeping authority over the tobacco industry claimed by the FDA. *See id.* at 1314-15 (explaining that deference to agency interpretations of ambiguous statutes is premised on a theory of implied delegation that is not always consistent with congressional intent). Specifically, the Court stated that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 1315. Thus, by rejecting the FDA's effort to assume unprecedented power over an industry absent a clear statement from Congress delegating to it that authority, the Court recognized that a clear statement rule plays a crucial role in constraining

agency behavior and enforcing the principles underlying the nondelegation doctrine.

c. The recently proposed rule by the Securities and Exchange Commission ("SEC") concerning the scope of services provided by accounting firms represents yet another agency effort to exercise unprecedented authority over, and to impose radical regulatory compliance costs on, an entire profession and, indeed, all American businesses serviced by that profession. Just as the FCC and FDA attempted to expand their authority based on their readings of isolated statutory terms, the SEC has attempted to define the statutory requirement that auditors be "independent" in a manner that would give the agency enormous and uncharted power over the accounting profession. *See* 65 Fed. Reg. 43,148 (2000). Specifically, the SEC has stated that it is considering, among other proposals, whether to "limit—or even completely bar—an auditor's provision of non-audit services to audit clients." *Id.* at 43,154. The SEC has also suggested that it has the authority to require an accounting firm "to segregate its audit and non-audit businesses into separate autonomous units" and otherwise demand the restructuring of the accounting industry. *See id.* at 43,173-74.

Not only would these proposed regulations constitute a radical departure from current federal policy concerning the regulation of the accounting profession, they would also impose enormous costs on publicly traded companies and the accounting profession. To begin with, the SEC itself concedes that, at a minimum, approximately 4,100 publicly traded companies would be forced to forgo (or find replacements for) some or all of the non-audit services that are currently provided by

their auditors. *Id.* at 43,185. The proposed restrictions would also force accounting firms to give up the significant revenue that they derive from providing non-audit services to their audit clients. *Ibid.* Most importantly, the proposed regulations could force accounting firms to absorb the considerable costs involved in spinning off or otherwise restructuring their non-auditing services—costs that the SEC pays little or no attention to in its proposed rules. *See ibid.*

If these proposed auditor service regulations were adopted, a clear statement rule could play an important role in evaluating the legitimacy of the SEC's attempted administrative coup. The decision whether to regulate the entire accounting profession in an unprecedented manner that would impose tremendous regulatory compliance costs on the profession, including the restructuring of major accounting firms, is certainly the type of important question of social policy that should be made by Congress rather than an agency. *Cf. Brown & Williamson Tobacco Corp.*, 120 S. Ct. at 1314-15; *MCI Telecommunications Corp.*, 512 U.S. at 231; *Benzene*, 448 U.S. at 645; *National Cable Television Ass'n*, 415 U.S. at 340-42. Thus, it would be appropriate to determine, as a threshold matter, whether Congress has clearly granted the SEC the authority it has claimed.

Under a clear statement rule, the SEC's proposed rules would be invalidated for the same reasons the Court rejected the FDA's tobacco regulations and the FCC's rate-filing requirements. The SEC's enabling legislation does not contain any statement by Congress, much less a clear one, that the SEC has the authority to make significant policy decisions affecting the entire accounting profession. And nowhere in the other provi-

sions of the federal securities laws cited by the SEC in its proposed rule is there a clear statement that the SEC possesses this kind of sweeping regulatory authority over the accounting profession. *See* 65 Fed. Reg. at 43,150 & n.14. Thus, applying a clear statement rule to the SEC's proposed regulations concerning auditor independence would allow a federal court to invalidate those regulations without reaching the constitutional issue of whether the federal securities laws themselves are unconstitutional because they violate the nondelegation doctrine.

d. The EPA's action in this case likewise cannot withstand scrutiny under a clear statement rule. Such a rule should be applied by the Court because, as the court of appeals determined, the EPA has construed its authority under the CAA so broadly that its air quality standards could ruin entire industries and "affect the whole economy." 175 F.3d at 1037. Like the authority claimed by the FCC, the FDA, and the SEC, this is precisely the type of regulatory authority that should be upheld only if clearly and explicitly authorized by Congress. The CAA, however, is devoid of a clear statement that the EPA has the authority to impose unlimited regulatory compliance costs on the businesses that comprise the industrial economy. Indeed, if anything, the text of the statute suggests that the EPA does not have this authority. *See* 42 U.S.C. §§ 7409 (requiring those who advise the Administrator to take into account the economic impact of air quality standards) and 7425 (providing "[m]easures to prevent economic disruption or unemployment" caused by the adoption of certain environmental standards). Since the challenged EPA action was not within the authority clearly and unambiguously granted to the agency by Congress, the Court need not reach the constitutional issue of whether the CAA, as interpreted by the EPA, constitutes an unconstitutional delegation of legislative power to an administrative agency.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
DOUGLAS R. COX
MARK A. PERRY
BRIAN C. GOEBEL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

September 11, 2000

AMICUS CURIAE

BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

INTEREST OF AMICUS CURIAE 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. The Court of Appeals Was Correct In Remanding The Rulemakings to EPA In Order to Allow the Agency to Explain Its Reasoning 9

II. EPA's Interpretation of § 109 of the Clean Air Act Leads to Absurd and Unjust Results 12

III. EPA Must Consider Costs and Other Social and Economic Factor When It Identifies a Level of Ozone That Is "Requisite" to Protect "Public Health." 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Amalgamated Meat Cutters v. Connally,
337 F. Supp. 737 (D.D.C. 1971) 8

American Lung Association v. EPA,
134 F.3d 388 (D.C. Cir. 1998), *cert. denied*,
120 S.Ct. 58 (1999) 11

American Trucking Associations, Inc. v.
United States Environmental Protection Agency,
175 F.3d 1027 (D.C. Cir.), *rehg denied*,
195 F.3d 4 (D.C. Cir. 1999) 1, 5

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 11

Holy Trinity Church v. United States,
143 U.S. 457 (1892) 12

Industrial Union Department v.
American Petroleum Institute,
448 U.S. 607 (1980) 8, 9, 11

International Union, UAW v. OSHA,
938 F.2d 1310 (D.C. Cir. 1991), *on remand*,
37 F.3d 665 (D.C. Cir. 1994) 11, 14

Lead Industries Assn v. EPA,
647 F.2d 1130 (D.C. Cir. 1980.) 15

Loving v. United States,
517 U.S. 748 (1996) 8

Mistretta v. United States,
488 U.S. 361 (1989) 8

Natural Resources Defense Council v. U.S. EPA,
824 F.2d 1146 (D.C. Cir. 1987) 9

United States v. Kirby,
74 U.S. 482 (7 Wall. 482) 13

Virginia v. EPA,
108 F.3d 1397 (D.C. Cir. 1997) 4

STATUTES

42 U.S.C. § 7401 2

42 U.S.C. §§ 7407-7410 2

42 U.S.C. §§ 7408(a)(2)(A), (b)(2) 7

42 U.S.C. § 7409(b) 2, 8

42 U.S.C. 7410(a)(1) 6

42 U.S.C. § 7509 8

42 U.S.C. § 7511(a) 3, 7

National Ambient Air Quality Standards for Ozone:
Final Rule, 62 Fed. Reg. 38,855 (July 18, 1997) 4, 5

National Ambient Air Quality Standards for Ozone:
Proposed Decision, 61 Fed. Reg. 65,728
(December 13, 1996) 5

56 Fed. Reg. 56694 (November 6, 1991) 3

Proposed Rule, 61 Fed. Reg. at 65727 ..... 5, 6

BRIEF OF *AMICI CURIAE* COMMONWEALTH OF VIRGINIA

The the Commonwealth of Virginia ("the *Amici* State") submits this brief as *amici curiae* in support of the American Trucking Association, Inc. and the States of Michigan, Ohio, and West Virginia. The *Amici* State supports the affirmation of the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g denied*, 195 F.3d 4 (D.C. Cir. 1999), which remanded the Environmental Protection Agency's ("EPA's") revised national ambient air quality standards ("NAAQS") for ozone and fine particulate matter.[1]

INTRODUCTION

This is not a case about whether cleaner air should be a national priority. The Amici State agrees that it must be, and Congress has so declared it. Instead, this is a case about how the standards for cleaner air shall be set. Are federal regulators to have unlimited discretion to set whatever arbitrary standards they wish? Or shall they be held accountable for what they do by being required to explain their decisions and base them on facts? More specifically, this case is a contest between two competing constructions of the key provision of the Clean Air Act, section 109, under which EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of

---

[1] This brief focuses on the ozone rulemaking. In the relating particulate matter proceeding before the court of appeals, the court held also that EPA violated the nondelegation doctrine. The *Amici* further supports the court's holding in this regard and believe that it dictates a similar conclusion in this case.

safety, [as] are requisite to protect the public health." 42 U.S.C. § 7409(b). Presented with two possible interpretations of § 109 - one that allows EPA unconfined and limitless discretion to alter the NAAQS and one that affords "intelligible principles" upon which to base such a change - the court of appeals was correct in adopting the latter. That is, the court was wholly justified in forcing EPA to explain its decision to revise air quality standards in such a manner as to facilitate a court's review.

INTEREST OF AMICUS CURIAE

The protection of public health and the environment is of manifest importance to the Commonwealth. In the furtherance of this policy, it fully supports strict regulation of air pollutants which threaten these interests. Congress established under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* ("CAA"), a unique federal-state partnership for controlling air pollution. Under this partnership, EPA sets and revises the NAAQS under § 109; the States maintain primary responsibility for achieving these standards. CAA §§ 107-110; 42 U.S.C. §§ 7407-7410.

The Commonwealth has a unique interest in ensuring that the § 109 is construed in a way that best protects the public health and welfare of Virginians as well as their social and economic well being. It also strongly believes that the statute must be construed to uphold Congress' federal-state partnership. The Commonwealth is uniquely positioned to provide public law and policy arguments on these points on behalf of its citizens.

EPA's decisions in this case upset this federal-state partnership. EPA set new air quality standards without adequately articulating the health and environmental benefits of such action. While the benefit to health is not clear, there is no doubt that EPA's action would have vast and far ranging consequences to the welfare of all Virginians. And,

as the State partner under the Act, it is left to enforce such standards which may have been altered without adequate justification.

This amicus brief is submitted under S. Ct. Rule 37, which allow the States to file such briefs without permission of the parties and without leave of court.

STATEMENT OF FACTS

The parties have submitted lengthy briefs setting forth the detailed statutory and factual background of this case. The Commonwealth will not repeat that background here. It is necessary, however, to draw attention to facts which underscore the impact of EPA's standardless rulemaking in this case.

In the 1990 Amendments to the Clean Air Act, Congress revised the air quality standard for ozone at .12 part per million ("ppm"). 42 U.S.C. § 7511(a).[2] Ozone, unlike many other pollutants, is not directly emitted by sources. Instead, it is formed from the mixture of two chemical precursors, nitrogen oxides ("NOx") and a group of hydrocarbon pollutants called volatile organic compounds ("VOCs").[3]

---

[2] As a result, States made designations for areas that did not meet the Congress' standard ("nonattainment areas") and EPA designated approximately 100 areas in the country as nonattainment for ozone. 56 Fed. Reg. 56694 (November 6, 1991). Congress included in its Amendments specific attainment deadlines for these areas; those deadlines are keyed to whether areas were classified as either "marginal," "moderate," "serious," "severe," or "extreme." CAA § 181(a)(1); 42 U.S.C. § 7511(a)(1).

[3] These precursors cook in the sun, during hot weather, and produce ozone through a complex chain of chemical reactions. The creation of ozone is a seasonal phenomenon, with concentrations peaking in the summer, and as a diurnal occurrence, with concentrations peaking during the afternoon and

These precursors originate from a wide variety of natural and man-made sources. Indeed, they come from virtually every facet of modern American life, including operating automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants.

Congress' ozone scheme has been quite effective in reducing ozone levels throughout the United States. According to EPA data, between 1987 and 1996, ambient ozone concentrations in the United States decreased by 15 percent; exceedances of the NAAQS decreased by 73 percent. Office of Air Quality Planning and Standards, EPA, National Air Quality and Emissions Trends Report, 1996, EPA Doc. NO. 454/R-97-013, http://www.epa.gov/oar/aqtrnd96/trendsfs.html.

Virginia's air quality has greatly improved under Congress' mandate. In the early 1990s, Virginia designated eleven counties and seventee cities in nonattainment for the ozone NAAQS. VR 120-01, Appendix K, January 1, 1992. Today, only the five counties and five cities in Northern Virginia, surrounding Washington D.C., are in nonattainment. 9 VAC 5-20-204.

Against this backdrop of improving air quality, EPA adopted new and far more stringent air quality standards for ozone, reducing allowable levels from the .12 ppm standard to .08 ppm measured over an 8-hour period. National Ambient Air Quality Standards for Ozone: Final Rule, 62 Fed. Reg. 38,855 (July 18, 1997). EPA did so without pinpointing specific health benefits, if any, of this radical change or demonstrating why the change was required. EPA found it hard to differentiate health benefits associated with this new standard or to demonstrate the elimination of a

---

falling during the night. *See Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997).

significant risk to public health. The Clean Air Scientific Advisory Committee ("CASAC"), upon which EPA relies in setting air standards, advised EPA that "there is no 'bright line'" distinguishing any of the alternatives as "significantly more protective of public health." Letter from George Wolff, Chairman, CASAC, to Carol Browner, Administrator, regarding CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone at 3 (November 30, 1995). It even highlighted a particular study demonstrating "small" health differences between "outdoor" children exposed to ozone at the existing .12 standard and those exposed to ozone at levels even more stringent that the .08 standard at issue. *Id.* In fact, CASAC was divided as to what ozone standard to adopt; a majority of the members supported a standard less stringent than .08 ppm. National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,728 (December 13, 1996).

Moreover, EPA seemingly ignored other important public health information relevant to ozone. For example, EPA acknowledged that, due to ozone's screening effect on harmful ultraviolate radiation, the reduction in ozone levels mandated by its new standard will increase malignant and nonmelanoma skin cancers and cataracts. EPA, Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers (Draft September, 1994). The Department of Energy predicted literally thousands of new cases of skin cancer and cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995).

As a result, EPA offered only vague references to "the nature and severity" of health effects, "the size of the sensitive population(s) at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35, citing Ozone Final Rule, 62 Fed. Reg. at 38,883. In short, EPA's decision is not based on science. *See* Proposed Rule, 61 Fed. Reg. at 65727.

While there is not clear health benefit, there is no doubt that this rulemaking would have vast and far ranging consequences. Nationwide, the new standard will place 20% of American counties into nonattainment. Brobeck, Phleger & Harrison LLP, Science and the High Cost of Cleaner Air, October 19, 1997. EPA's own regulatory impact analysis estimates the overall cost of complying with the NAAQS to be $9.6 billion annually. Innovative Strategies and Economics Group, EPA, Regulatory Impact Analysis for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule ES-12 (1997). By contrast, EPA estimates total yearly benefits from compliance at between $1.5 and $8.5 billion. *Id.* at ES-17. Other studies are not so conservative. The American Petroleum Institute estimates the cost of achieving the new NAAQS ranging from $2.5 to 7.0 billion *in the Chicago metropolitan area alone*. The Monetary Benefits of An 8-Hour 0.08 ppm Ozone Standard in Chicago, Research Study # 085, August, 1996. Another study suggests costs of $40 to $60 billion per year. Science and the High Cost of Cleaner Air, Brobeck, Phleger & Harrison LLP, October 19, 1997.

In Virginia, preliminary projections indicate that 17 counties and 21 cities will be in nonattainment under the .08 standard, including all of its major metropolitan areas. This portends profound economic and social consequences for the Commonwealth and its citizens.

In practical terms, States, which must implement the new standard,[4] will be required to limit emissions from "sources,"

[4] Once EPA revises an air standard, the Act requires that the Commonwealth develop and submit to EPA a state implementation plan ("SIP") under which it will implement, maintain and enforce the new standard. CAA §110(a)(1); 42 U.S.C. 7410(a)(1). The SIP must "include enforceable emission limitations and other control measures, means, or techniques

including automobiles, trucks, buses, trains, manufacturing facilities, refineries, and electrical power plants. A manufacturing plant, for example, may be forced to reduce emissions to meet State requirements by shifting capital from plant expansion to the purchase of advanced technology pollution control equipment or by reducing its hours of operation. CAA §§ 108(a)(2)(A), (b)(2); 42 U.S.C. §§ 7408(a)(2)(A), (b)(2). Either option could cost workers jobs and result in higher prices for consumers. An electric utility may be forced to reduce emissions by changing its fuel source to cleaner burning coal imported from outside the region, thus driving up prices for consumers. Ordinary citizens may be required to reduce automobile emissions by submitting to emissions testing and making expensive equipment upgrades for older models. CAA §§ 182(a)(2)(B)(i), (b)(4), (c)(3); 42 U.S.C. §§ 7511. In some cases, States may even be required to institute transportation control measures to offset growth or bring emissions within projected levels. CAA §§ 182 (c)(5, (d)(1)(A); 42 U.S.C. §§ 7511a. That is, citizens may be required to curtail automobile travel and the use of recreational vehicles and other mechanized equipment. In addition, in nonattainment areas, businesses are unable to locate or expand unless new emissions are offset by reductions elsewhere. *See* CAA §§ 182(a)(4), (b)(5), (c)(10) (d)(2), (e)(1); 42 U.S.C. § 7511. Faced with a choice between locating in a nonattainment or attainment area, businesses will pass by the nonattainment area in favor of other areas. Whole communities will be shackled from development, stunting growth, development, and quality of life for its citizens.

(including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act." CAA §110 (a)(2)(A); 42 U.S.C. 7410(a)(2)(A).

The costs are even higher under the Act if a State fails to implement such measures in nonattainment areas. The Act allows the Administrator to choose between cutting of federal highway funds and imposing additional emission offset requirements for new source permits. CAA § 179; 42 U.S.C. § 7509. One estimate suggests that 72% of highway construction jobs in Virginia would be threatened by such sanctions and $311,000,843 in highway funds are at stake. Economic Impact of Proposed EPA Ozone and PM Standards on the US Highway Construction Industry, ARTBA, (May, 1997).

Certainly, radical changes such as the new ozone standard must be based on "intelligible principles" that will facilitate a court's review. EPA failed to articulate such principles. Rather, it hides behind laudable statutory goals; at the same time, it conceals the real policy driven basis for the regulatory actions at issue.

SUMMARY OF ARGUMENT

A federal agency must explain its regulatory decisions in such a manner as to allow "meaningful judicial review." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three judge panel). *E.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta v. United States*, 488 U.S. 361, 379 (1989). The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

Under section 109(b), EPA is to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b). Attempting to alter a

Congressionally ratified standard for ozone, EPA adopted a new, more stringent standard without the minimal finding that the new standard was "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out by § 109(b)(1). As a result, the court of appeals was correct in concluding that EPA had not articulated "intelligible principles" in deciding whether and how to revise the ozone and particulate matter NAAQS. The court of appeals' decision is consistent with precedent and guarantees that the States and their citizens will not be without recourse to challenge arbitrary government action.

ARGUMENT

I. The Court of Appeals Was Correct In Remanding The Rulemakings to EPA In Order to Allow the Agency To Explain Its Reasoning.

The nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Benzene*, 448 U.S. at 685-86. As explained below, the court of appeals was correct to remand the revised standards to the agency "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038.

Prior to EPA's challenged rulemaking, Congress set the ozone standard at .12 ppm. Section 109 of the Clean Air Act dictates that EPA's revised standard must be at a level "requisite to protect public health" with "an adequate margin of safety." Ozone itself complicates this statutory directive; it is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. 175 F.3d at 1034; 62 Fed. Reg at 38,863. *See also Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1148 (D.C. Cir. 1987) (*"Vinyl Chloride"*) (a "non-threshold" pollutant is one that "appears to create a risk to health at all non-zero levels of

emission"). Thus, in order to change the level imposed by Congress to something other than zero, EPA must explain why it settled on a specific level, and not some other, because any presence of ozone is presumed to present some threat to health or the environment.

But EPA failed to provide the court of appeals with any ascertainable standard which might have facilitated the court's review of its action. It did not identify a level of air quality that is "requisite" to protect public health. That is, EPA does not elucidate why measuring ozone at .08 ppm is requisite while other levels – for example, .07 ppm or .09 ppm - are not. EPA did not explain how the level it chose presents "an adequate margin of safety." The court of appeals carefully reviewed the administrative record and found that EPA's three primary reasons for its new NAAQS amounts to nothing more than a reflection that lower levels moving towards zero "are associated with lower risk to public health." 175 F.3d at 1035. Given that ozone is created naturally in the environment and that the results of EPA's standardless revision have the potential of affecting nearly every aspect of modern life, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants, the court was entirely correct.

The court of appeals decision to remand was not novel or drastic. Indeed, it is entirely consistent with this Court's jurisprudence. As Chief Justice Rehnquist has explained the nondelegation doctrine serves important functions:

First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the

delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 685-86 (1980) (*"Benzene"*).

This case does not involve the first or second components of the Chief Justice's narrative. The court of appeals has not determined that § 109 delegated too much power to a federal agency, *e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935), or failed to set forth standards to constrain agency discretion. Rather, this case involves the final component - the court deployed the nondelegation doctrine as a tool of statutory construction to prevent a federal agency from interpreting its delegated authority so broadly as to give it unfettered, and virtually unreviewable, discretion.

The court of appeals' decision is entirely consistent with its own precedent. That court has not hesitated to require federal agencies to explain their reasoning in order that such reasoning could be reviewed. *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S.Ct. 58 (1999) (remanding for EPA to determine what risks are tolerable); *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (remanding lockout/tagout regulation so that OSHA could articulate principles constraining its application of rulemaking authority under the OSH Act), *on remand*, 37 F.3d 665 (D.C. Cir. 1994) (approving regulations because agency supplied sufficient list of principles).

The court of appeals decision also is workable. EPA itself admits in its Petition for Certiorari that it might be able to discern such intelligible principles under § 109. For

example, EPA calls attention to the Clean Air Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," and which requires it to consider the "public health," and not "individual health." Petition at 15.

In short, EPA did not articulate intelligible principles in deciding whether and how to revise the NAAQS. EPA should not be free to ratchet its standards ever more stringently based solely on whim or conjecture. This Court should affirm the court of appeals and require that EPA explain its reasoning why its new standard is required.

II. EPA's Interpretation of § 109 of the Clean Air Act Leads to Absurd and Unjust Results.

Presented with two possible interpretations of § 109 – one that allows EPA virtually unlimited discretion to alter the ozone NAAQS and one that precludes it - the court of appeals was obligated to interpret it in a way that avoids an absurd and unjust result.

This Court has long held that where a statute is susceptible of more than one interpretation, a court must avoid an interpretation that leads to an absurdity or an unjust result, if an alternate, reasonable interpretation may be found:

If a literal construction of the words of a statute be absurd, the act must be so constructed to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.

Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed

that the Legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (7 Wall. 482) (1869).

In this case, the court of appeals' interpretation of § 109, which precludes EPA from implementing new air standards without adequately explaining why, avoids absurd and unjust results. Indeed, following EPA's reasoning to its logical conclusion, it is not difficult to ascertain the absurdity of altering the existing standards for ozone without such an explanation. First, as explained above, ozone is a non-threshold pollutant – meaning that there is no level below which all health risks disappear. Without being required to explain why its new standard is "requisite" or not requisite "to protect the public health" with "an adequate margin of safety," the formula set out in § 109, EPA conceivably is free to ratchet its standard ever more stringently based solely on some incremental health risk. Such a result could have, in practical terms, devastating social and economic consequences. As explained above, both the natural environment and activities involving nearly every aspect of modern life result in emission of the precursor elements for ozone, including the operation of automobiles, trucks, buses, trains, manufacturing facilities, and electrical power plants. In light of the controls States are required to implement for nonattainment areas, the consequences of setting an exceedingly stringent ozone NAAQS are not hard to conceptualize. They include reduced economic development, wholesale reduction of business activities, with the attendant increase in unemployment, higher production and transportation costs, which will be passed on to the consumer, higher utility costs and/or reduction in electrical supplies, with attendant health consequences for those without adequate climate control, and limitations upon the use of personal automobiles. Surely Congress did not intend EPA to exercise such power without identifying a standard against which a court might gauge its merit.

The lower court's decision in *International Union* illustrates the point. There OSHA issued new regulations requiring that employers install safety devices on machinery that could suddenly move and injure workers. Employers were required to install locks to keep the machines from starting or post warning tags. 938 F.2d at 1312. In remanding the standard to OSHA, the court was particularly wary of the agency's reliance on incremental improvement for workplace safety as justification for the regulation. "The upshot is an asserted power, once significant risk is found, to require precautions that take the industry to the verge of economic ruin (so long as the increment reduces a significant risk) . . . or to do nothing at all. All positions in between are evidently equally valid." 938 F.2d at 1317 (citations omitted). Moreover, the court recognized "the power to vary the stringency of the standard is the power to decide which firms will live and which will die. At the simplest level, for example, compliance may involve economies of scale, so that a tough standard will erase small, marginal firms and leave the field to a small group of larger ones." *Id.* The Court remanded the standard to OSHA and upheld it only after remand when OSHA returned with a "Supplemental Statement of Reasons" for the regulation, which included significant risk, feasibility, and cost-effectiveness. *International Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994).

The court's concerns in *International Union* are equally applicable to the case at bar. Like the potential power asserted by OSHA in *International Union*, EPA's assertion of authority in this case allows it to adopt any level of ozone with "[a]ll positions in between are evidently equally valid." From a practical standpoint, EPA would have the power to decide which communities will remain vibrant and growing and which will not simply by picking a number.

III. EPA Must Consider Costs and Other Social and Economic Factors When It Identifies a Level of Ozone That Is "Requisite" To Protect "Public Health."

For the reasons set out above, *Amici* submit that the court of appeals was correct in remanding the ozone and particulate matter standards to EPA in order to articulate "a determinate standard on its own." 175 F.3d at 1038. If the Court affirms the court of appeals on this issue, *Amici* further submit that EPA must be able to consider social and economic factors and indirect public health effects forclosed by the court of appeals decision in *Lead Industries Asss'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980.) The cross-petitioners in Case 99-1426 have already submitted detailed briefs on this issue and *Amici* will not repeat those arguments here. In short, "a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost." *Benzene*, 448 U.S. at 670. *Amici* fully support the positions stated in the briefs submitted by the States of Ohio, Michigan, and West Virginia and the American Trucking Associations.

CONCLUSION

EPA's rulemaking in this case stands as a stark example of a federal agency's unconfined and vagrant use of delegated power. The court of appeals should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

By Counsel

MARK L. EARLEY
Attorney General of Virginia

WILLIAM HURD
Solicitor General
ROGER L. CHAFFE
Senior Assistant Attorney General
STEWART T. LEETH
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-6957 (voice)
(804) 786-0034 (fax)

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

(38)

No. 99-1257

In the Supreme Court of the United States

OCTOBER TERM, 2000

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*, PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.* RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF PEOPLE FOR THE U.S.A. and THE ALLIANCE FOR AMERICA IN SUPPORT OF RESPONDENTS

CHRISTOPHER C. HORNER
Counsel of Record
and Counsel for Amici Curiae
813 Duke Street
Alexandria, Virginia 22314
(703) 549-4989

BEST AVAILABLE COPY

QUESTION PRESENTED

Parties to this Brief *Amicus Curiae* address only Question 1:

Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

TABLE OF CONTENTS

STATEMENT OF INTEREST ---------- 1

QUESTION PRESENTED ---------- 2

SUMMARY OF ARGUMENT — The EPA has usurped legislative power in violation of the non-delegation doctrine which must be cured by narrow statutory invalidation. ------ 2

I. Standard setting is a "high" delegation. ---------- 3

II. The Court can rule narrowly, thus with measured effect. 4

III. The Court should continue to recognize that the non-delegation doctrine acts against Congress. ---------- 8

IV. The Appeals Court's tentative answer to Question One 10

V. Standard of Review ---------- 13

VI. The Vitality of Non-Delegation ---------- 16

VII. *Chevron* begs *Schechter* — The Need for Non-Delegation ---------- 20

VIII. Separation of Powers Jurisprudence is, by nature and by design, Formalistic. ---------- 22

IX. A narrow but firm decision will have limited, measured and necessary effects. ---------- 26

CONCLUSION — A narrow but firm holding is called for ---------- 30

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. U.S.,
295 U.S. 495 (1935) ---------- 4, 8, 16-21

Ashwander v. TVA, 297 U.S. 288 (1936) ---------- 7

American Trucking Associations, Inc., et al. v. U.S.E.P.A. et al.
175 F. 3d 1027 (1999) ----------2, 3 n. 2, 5, 10 n. 7, 12

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984
---------- 6, 13, 20, 21, 25

Clinton v. New York, 524 U.S. 417 (1998) ----------22-23

Dred Scott v. Sanford, 60 US (19 How.) 393(1857) --------- 16

J. W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394 (1928)
---------- 14 n. 11, 17

Industrial Union Dept. v. American Petrol. Inst.,
448 U.S. 607 (1980) ---------- 14 n. 10, 16, 26

INS v. Chada, 462 U.S. 919 (1983) ---------- 22, 26

Mistretta v. U.S.,488 U.S. 361 (1989) ----------5, 19

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 ---------20

Opp Cotton Mills v. Administrator of W. and H. D.,
312 U.S. 126 (1941) ----------18

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)---------- 9

Touby v. U.S., 500 U.S. 160 (1991) ---------- 12 n. 9

U.S. v. Butler, 297 U.S. 1 (1936) ---------- 15 n. 11

U.S. v. Darby, 312 U.S. 100 (1941) ----------18

U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985)
---------- 23, 24 n 13

TABLE OF AUTHORITIES cont.

U.S. v. Salerno, 481 U.S. 739 (1987) ---------- 6

Wallace v. Bone, 286 S.E. 2d 79 (1982 N.C.) ----------22

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) ----------6, 7 n. 4, 8 n. 6

West Coast v. Parrish, 300 U.S. 379 (1937) ----------19

Yakus v. U.S., 321 U.S. 414 (1944)----------16

U.S. Constitution and Codes

U.S. Constitution, Art. I, Sec. 7----------23
U.S. Constitution, Art. I, Sec. 8----------20

Administrative Procedures Act
5 U.S.C. § 706----------15
Clean Air Act, 42 U.S.C. 7401 *et seq* ---------- *2*
Section 109, § 7409 ---------- 2, 5, 10, 11 n. 7, 30
Section 110, § 7410 ---------- 3 n. 2
Section 181, § 7511 ----------27
§ 7607 ----------15
Clean Air Act Amendments of 1990,
Pub. L. No. 101-549, 104 Stat.2399 ----------27
Clean Water Act, 33 U.S.C. 1251 *et seq*
Section 404, 33 U.S.C. § 1344 ---------- 24 n. 13
Fair Labor Standards Act of 1938
52 Stat. 1060 ----------19
Line Item Veto Act, 2 U.S.C §691 *et seq* ----------22
§691 ----------22
National Industrial Recovery Act of June 16, 1933
48 Stat.195 ----------17
Regulatory Flexibility Act
5 U.S.C. § 601 ----------4 n. 3, 11 n. 7, 26
Sentencing Reform Act of 1984
28 U.S.C. § 994 ---------- 5
Small Business Regulatory Enforcement Fairness Act,
Pub. L. No. 104-121, tit. II, 110 Stat. 857-74 ------ 11 n. 7

TABLE OF AUTHORITIES cont.

Federal Register

62 Fed. Reg.
§ 38,688 ---------- 13
§ 38,702/2 ---------- 3 n. 2
§ 38,868/3 ---------- 11 n. 7
§ 38,887/2-3 ---------- 3 n. 2

Miscellaneous

Breyer, Stephen, *Breaking the Vicious Cycle - Toward Effective Risk Regulation*, Harvard University Press, Cambridge, MA. (1993) ---------- 25 n. 14

Breyer, Stephen, *Regulation and its Reform*, Harvard Unviversity Press, Cambridge, MA (1982) - 14 n. 11, 27 n. 15

Breyer, Stephen, *The Legislative Veto After Chada*, 72 Georgetown L. J. 785 (1984) ---------- 24, 27 n. 15

Davis, Kenneth Culp, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 712 (1969) ---------- 20, 25

Madison, James, *Federalist No. 51* ---------- 17

Scalia, Antonin, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511 ---------- 12, 21

Schoenbrod, David, *Power Without Responsibility- How Congress Abuses the People Through Delegation* Yale University Press, New Haven, CT (1993) ------ 29-30

In the Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*, PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.* RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* PEOPLE FOR THE USA and THE ALLIANCE FOR AMERICA

STATEMENT OF INTEREST

People for the USA and The Alliance for America (" the Parties ")[1] are non-profit organizations with the stated goals of promoting sustainable resource development, multiple use of public lands, and strong property rights consistent with the U.S. Constitution. Both organizations are characterized by individual membership and also act as national umbrellas for other groups throughout the country that share these goals. Membership under the umbrella of the two groups runs to more than two million people.

Executive and agency actions potentially representing significant conflict with the non-delegation ideal directly affect the Parties' efforts at achieving their stated goals, to the detriment of their memberships and often to the detriment of entire rural communities in which many members live or recreate. The Parties appear before the Court to encourage the strong, but narrow, measured step which it urges in this matter.

[1] No counsel for any other party authored this brief in whole or in part, and no persons or entities other than the *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, with corresponding documentation simultaneously filed with the Court.

Parties appreciate that Congress, both generally, and to clarify the intent of the statutory authority at issue in the present case, must strike a delicate balance between potential health effects and burdens to other aspects of the public welfare measured in different terms. The Parties will be affected by the outcome of this case in controversy, which will establish not the ozone and particulate matter standards themselves, but the entity to appropriately establish such standards. The larger meaning for the Parties is that the Court, in accepting the narrow result sought by respondents, will reaffirm the vitality of a relevant doctrine which has been unduly relegated to the judicial backbench. The appropriate outcome urged by the Parties is a measured step in affirming the constitutional ideal of separate, identified powers for each of three distinct branches of government.

QUESTION PRESENTED

The Parties address only Question 1:

Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

The Parties believe an affirmative answer to this question, as they urge, renders moot the subsequent two questions accepted by the Court on *certiorari* from the United States Court of Appeals for the District of Columbia Circuit in the case of *American Trucking Associations, Inc., et al. v. U.S.E.P.A. et al.*, 175 F.3d 1027 ("*Trucking*").

SUMMARY of ARGUMENT - The EPA has usurped legislative power in violation of the non-delegation doctrine which must be cured by narrow statutory invalidation

The argument in this case is not one of statutory, but constitutional, interpretation. The Parties argue that because EPA is attempting to conform its interpretation of the statute to the Constitution, there is no protection for, or deference to, agency expertise as to its authority or limitations pursuant to

the Constitution. The Parties urge that this Court see beyond the implicit nostrums of petitioners' camp against judge-made law and recognize that the matter at issue is indeed which branch of government is the appropriate body to establish standards in pursuit of which an agency sets rules. Under the particular circumstances where discretionary bounds are inadequate to address the factual setting of the rulemaking at issue, the standards or clear bounds of discretion should be set by Congress. It is EPA inappropriately usurping the lawmaking function here; and the solution is not for the judiciary to make the law, but for the Court to remand this function to Congress, in the specific instance at hand, through narrow statutory invalidation.

I. Standard Setting is a "high" Delegation

Indeed, in disavowing any connection between the NAAQS and its implementation[2], the Parties believe EPA sets the standard apart as preeminently executive-lawmaking (quasi-

[2] See *Trucking*, 175 F.3d at 1044: "According to the EPA, the NAAQS themselves impose no regulations upon small entities". This theory was advanced by EPA to defend its certification that its revised NAAQS will "not have a significant economic impact on small entities within the meaning of the RFA." PM Final Rule, 62 Fed. Reg. at 38,702/2; Ozone Final Rule, 62 Fed. Reg. at 38,887/2-3. While relying on precedent of direct versus indirect effects, the Parties think this a semantic argument in the immediate context. The appeals panel itself found no difficulty in imagining the burdens which NAAQS might pose: "Here, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart-the maximum stringency would send industry not just to the brink of ruin but hurtling over it...", *Trucking*, 175 F.3d at 1037. EPA's contention that the states will do the dirty work of actual implementation demonstrates how this framework frustrates the purpose of assigning an appropriate accountable entity. State agencies frequently defend themselves with "EPA made me do it" when implementing the unpopular results of even the existing standard. Further, EPA plays the wolf in sheep's clothing which may be stripped away by 42 U.S.C. 7410 (c):

> "(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator -(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or (B) disapproves a State implementation plan submission in whole or in part.", *Id.*

legislating), not law enforcing. The Parties argue that this is axiomatic and heightens the very likelihood of an unconstitutional delegation, *i.e.*, the delegation of setting the NAAQS is a more extensive one than the delegation of NAAQS implementation. Applying a similar rationale to a pattern of enforcement against individual parties might withstand a non-delegation test that the standards presently challenged do not, *e.g.*, EPA focusing enforcement resources not on the entire range of values representing a violation of some standard, but on that range which it deems represent the preponderance of the regulated risk.

EPA having thus bifurcated or distinguished its actions under the statute at issue, the Parties disagree with Massachusetts and New Jersey (MA & NJ) that this is not a case "in which the entity to whom authority has been assigned exercises nothing but the lawmaking function", MA & NJ Brief, p. 35[3]. At issue is whether this delegated lawmaking function of setting standards is effectively bounded and thus constitutionally acceptable quasi-legislating.

Petitioners and their *Amici* argue that, since the non-delegation line established by the Court in *A.L.A. Schechter Poultry Corp. v. U.S.* , 295 U.S. 495 (1935), this Court and others have rightly approved increasingly broad delegations. That is, however, a different measure than the one the Parties describe as distinguishing the "height" of the particular delegation of standard setting.

---

2 cont. Nonetheless, this question is not before this Court; but the Parties maintain that if EPA will live by the sword, it must die by it as the well. The setting of standards with no relationship to their enforcement is precipitously close to jumping the bounds of executive lawmaking and usurping the true lawmaking power.

3 It is unavoidable, if redundant, to point out that MA & NJ support this argument by claiming "the [EPA] Administrator is charged not only with setting the NAAQS but also with ensuring their implementation by the states". The Parties do not think such an argument would be so casually advanced if the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601, issues were still on the judicial table. How can one logically find the powers executed by EPA conjoined to defend their wielding but separated to defend their effect?

By broader delegation, the petitioners' camp appears to mean the drawing of greater numbers of specific personal and economic activities under the direct governance of administrative agencies rather than the legislature, and the allowance of delegations that have been general rather than specific in terms of grants of authority and bounds to constrain them, see, *e.g.*, EPA Brief, p. 21 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (quoting *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)) — in *Mistretta* this Court approved a broad delegation to set mandatory uniform sentencing guidelines for the entire country, but the standards were the sentences already set by Congress as codified in title 18 U.S.C.; and the discretion was not vague, seven relatively concrete factors were enumerated, see 28 U.S.C. 994 (c)). The Parties urge, for the sake of clarity in discussion and jurisprudence, that this Court should distinguish even these two forms of expansion by characterizing the breadth of activities or actors affected as defining the "width" of the delegation, and the extent of abstract versus concrete bounds of discretion as defining the "vagary" of the delegation.

The question of whether Section 109 of the Clean Air Act as interpreted by EPA effects an unconstitutional delegation of legislative power is one of degree measured in these several dimensions. The Parties argue that the delegation here reviewed is 'broad', *i.e.*, it could "send industry [and the Parties would add industrial society] not just to the brink of ruin but hurtling over it", *Trucking* 175 F.3d at 1037; is 'high', *i.e.*, it is an important choice of a social policy standard unrelated to the enforcement of that standard implicating, in EPA's own view, the ethical dilemma of effectively deciding the acceptable number of "early deaths...[and] hospital admissions", EPA Brief, p. 2; and is 'vague', the boundaries of discretion are established by the abstract concept of "requisite to protect the public health" ,"allowing an adequate margin of safety", 42 U.S.C. § 7409 (b)(1).

II. The Court can rule narrowly, thus with measured effect.

Petitioner's camp focuses arguments on the notion that the Act itself need not supply "determinate criterion" (see Brief of American Lung Association, p. 12-13, "*Chevron*...and other precedent of this Court recogniz[e] that Congress may legitimately write ambiguous [*i.e.*, nondeterminate] statutes".) This defense is merely dispositive of the question of whether Section 109 is facially invalid. Its line of reasoning simply defines why many delegations that may seem facially excessive may nonetheless stand without the specific circumstances of a case or controversy narrowing the question. As articulated in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 524 (Justice O'Connor, concurring) (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

The comfort that petitioners find in a general refusal by the courts to lay waste to the practice of delegating some function or authority to the Executive simply does not extend to protect them from review of a particular delegation in practice. "The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid", *Ibid*; and conversely the fact that the statute might operate constitutionally under some "conceivable set of circumstances", even if that were a majority of circumstances, does not universally insulate the statute from scrutiny.

To say, then, that under the precise circumstances here reviewed and relative to this particular rulemaking Section 109 is unconstitutional is not to say that it is now wholly or *prima facie* unconstitutional. It is not to call into question other actions previously taken under Section 109 involving different facts. Indeed, Justice O'Connor went quickly to the heart of the constitutional matter here at issue in *Webster* by invoking the doctrine of judicial restraint which implicitly supports *Salerno*, *i.e.*, that "[n]either will [the Court] generally 'formulate a rule

of constitutional law broader than is required by the precise facts to which it is to be applied'" *Webster*, 492 U.S. at 526 (quoting *Ashwander v. TVA*, 297 U.S. 288, 347)[4]. The Court has before it precise facts which the Parties argue demonstrate that "Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power", first question presented on *certiorari* in the present matter (emphasis added).

The very specificity of the question accepted manifests the cited rule of judicial restraint. No parties ask the court to leave these narrow circumstances and thus the Parties think the remedy to the question presented will be limited in effect to the rule here at issue.[5] This Court recognizes that a narrow holding is not synonymous with a timid one, and the Parties urge that this Court take a clear but measured step to reaffirm the vital doctrine of non-delegation which has seldom broken the surface of jurisprudence since *Schechter*, but has remained just beneath.

---

[4] This rule is arguably the common ground between the concurrences of Justice O'Connor and Justice Scalia, see *Webster*, 492 U.S. at 533 (Justice Scalia concurring in part and concurring in judgment), "what is involved [is]...the principle that we will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ". The point of agreement devolves thence to disagreement whether there might be "good reason" to depart from that "sound general principle", *Ibid*. The plurality, as history tells, strikes a course between the shoals of this argument. In any event, the Parties do not argue there is, nor do they think that this Court will find, "good reason" to depart from the "sound general principle" here. The case rises and falls on the precise facts at issue and the ruling should apply to the determinations here in controversy, not to others made under Section 109, unless these decisions shall prove in future proceedings to mirror those in the present matter.

[5] It is axiomatic that the analogous meaning of the ruling indeed may bring about effects in other realms, but only under analogous circumstances. Unlike EPA, which appears to assert that the standards it sets somehow have relation only to the benefits they will confer and no relation to the burdens they will ultimately impose, the Parties believe that the meaning of this case as decided will indirectly benefit other applications of authority. This does not mean that the direct effect of the case will not be narrow, and such indirect or iterative effects similarly precise. See generally, IX. A narrow and firm decision will have limited, measured and necessary effects., *infra*, p. 26-30.

III. The Court should continue to recognize that the non-delegation doctrine acts against Congress.

We concur with *Amicus* Environmental Defense Fund *et al* (EDF) that the Court has "continued to view this [non-delegation] doctrine as a constraint on congressional — not administrative — action." There is, however, no precedent cited by EDF, nor is it mutually exclusive of the possibility, to suggest that execution of the statute may not eventually expose a contextual violation which hazards some precise portion of the statute in application. Indeed, the vital constitutional doctrine which begs reaffirmation herein, as with many others, would have little meaning whatsoever if statutes may not be examined based on subsequent actions of the Executive because there exist some other "conceivable set of circumstances" which are constitutional.[6] It does not immunize the Executive for all applications of congressional authority.

EPA's findings that ozone (definitely) and particulate matter (likely) are non-threshold pollutants were unanticipated by the discretionary limits set by the statute. The fact that the

---

6 The claim in *Webster* regarding the constitutionality of a Missouri state statute, 188.205, which precluded the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion was dismissed with prejudice following the state interpreting the statute as not aimed at the primary doctor patient relationship, but simply directed the state's fiscal officer not to allocate public funds for abortion counseling, see *Webster*, 492 U.S. at 512-513, part C. Surely, if a future agent of the state enforcing 188.205 should "change" the aim of the statute, *e.g.*, to prohibit state payments for any sort of care rendered by a doctor if they were shown to occasionally engage in abortion counseling with any patient, the controversy would be renewed, even though the initial claim was dismissed with prejudice. Justice O'Connor noted in *Webster* that the final arbiter for interpretation would be the Supreme Court of Missouri, *Webster*, 492 U.S. at 524; but simply having affirmed that one interpretation is within fair executive reading of the statute does not necessarily preclude executive "rereadings". It seems a surety that the claim of statutory invalidity would no doubt have returned to the federal courts based upon the hypothetical "change" in executive interpretation of the statute posed, *i.e.*, the validity of legislative action stood constantly at risk over executive interpretation.

statute provides for additional guidance from the Clean Air Scientific Advisory Committee (CASAC) in reality merely means that EPA may receive a policy endorsement for its defense of the standard it chose, but does not speak to whether the standard is within bounded discretion. Put another set of parentheses around a parenthetical clause, and you still have a parenthetical clause.

Looking to the history of the statute, EDF proposes that one may glean limit to EPA's discretion under Congress' abstract standard by reference to Senate Report No. 91-1196 at 10 (1970). EDF synthesizes a portion of the report to mean that "the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals", EDF Brief p.13. There is some basis for such an interpretation, but EDF offers no evidence that EPA set the standard challenged herein pursuant to such guidance, or that it plans to apply similar logic to distinguishing sensitive populations and individuals in the future.

To all appearances, the precise facts of this case indicate a circumstantial breach of the non-delegation doctrine. While Congress may surely make facially unconstitutional delegations of legislative power, EDF inaccurately argues that, though the doctrine is directed against Congress, it may not be called to effect by actions of the Executive. The Parties analogize a *prima facie* statutory violation of the non-delegation doctrine as the legislative river flooding its constitutional banks, to paraphrase Justice Cardozo in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935). It thus follows that if the river is not flooding, but is running high (as the Parties contend when viewing the nature of the delegation implicit in standard setting responsibilities) it is much easier for the agency to reach into the river and take legislative water from it. The Parties think the D.C. Circuit mistakes the appropriate remedy to be some form of water treatment, rather than simply telling the agency to put the water back.

Here again, the Parties concur with *Amicus* EDF that an affirmative answer to the first question presented begs a remand to Congress, not the agency. See EDF brief p. 4 ("...the

nondelegation doctrine simply does not have a 'weak' version that is served by setting aside regulations as well as a "strong" version that compels declaring statutes unconstitutional."). The Parties believe the confusion arises because the holding of the court below was both narrow and shallow. The Parties urge this Court to hold narrowly with the D.C. Circuit but to discard the hesitancy of its approach. Thus the Parties proceed to the discussion of how the appeals panel actually answered the first question presented.

IV. The Appeals Court's tentative answer to Question One

The Parties argue that much of the confusion over properly invoking the non-delegation doctrine arises from an answer to question one incompatible with the precise facts of this case. The D.C. Circuit's ruling in the present matter effectively answers the question of whether EPA's interpretation of Section 109 effects an unconstitutional delegation of legislative power, neither "yes" nor "no", but rather "maybe".

Here we distinguish the intelligible from the rational. If an "intelligible principle" had been found in EPA's interpretation of the statute by the appellate court, and EPA's decision, regardless of how rationally defensible, fell outside the bounds of that principle, a remand to the Agency would be proper. EPA has rejected or forsworn any obviously applicable intelligible principles corollary to the boundaries implied by "requisite to protect the public health", "allowing an adequate margin of safety", 42 U.S.C. 4709 (b)(1), which would properly bound its decisionmaking on non-threshold pollutants, *e.g.*, zero-risk[7], or cost-benefit[8].

Additionally, EPA refuses to adopt the boundaries it proposes here by way of level of certainty and seriousness of

[7] While the appeals panel noted that no party before it seemed to propose the adoption of zero-risk, it held this out as a possibility, see *Trucking*, 175 F. 3d 1038. Both the appeals court, explicitly, and EPA, implicitly, must understand the quixotic quality of applying a zero standard to emissions which are a ubiquitous byproduct of so many aspects of modern society and, even more challenging, a product of nature as well. Nonetheless, it is conceivable that EPA could have adopted a 'no human contribution' standard. There is some hint that their standard approaches this level, but EPA declined to adopt .070 PPM

effects. It simply advances them as rational defenses of the standard but not controlling elements. As stated above, EPA refuses another option, to state that the division it makes here articulates between sensitive individuals and sensitive populations, thus giving some measure of legislative history support to its discretion. It defends these refusals as necessary to guard the prerogative of future administrators, but that does not explain why the current administrator will not find any determinate criteria that are binding even on her. The Parties

[7] cont. based on the fact that analogous, naturally occurring levels were occasionally found in some places, see Ozone Final Rule, 62 Fed. Reg. at 38,868/3 "[.07 standard would be] closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources."

The Parties do not favor such a standard, but would find consistent reliance upon it at least a more intelligible, if impractical, understanding that there are discretionary confines for establishing standards which "are requisite to protect the public health", "allowing an adequate margin of safety", 42 U.S.C. 4709(b)(2). Were the Court to remand with such a principle, the EPA rule thus formulated would not only run directly at odds with continuing an industrial society, but arguably with continuing much more than a hunter-gatherer existence for the nation's populous. Indeed, the appeals court effectively admits that anything hunted or gathered would have to be eaten raw, as fire itself must likely be prohibited in such a scenario (*Trucking*, 175 F. 3d at 1038, fn. 4). Nonetheless, if this is what the CAA demands, rather than jumping the bounds of discretion to avoid a politically unpopular result, EPA should call it as it is and see if Congress will change the act.

Further, the Parties think the obvious implications of a zero-standard or zero-human-impact standard would make short work of EPA's contention that the Regulatory Flexibility Act, 5 U.S.C. § 601 and amendments to it under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 857-74, are inapplicable to the NAAQS. No imaginable implementation of such a standard could take place without destructive upheaval among small business, big business, and the citizenry in general..

[8] Whether cost-benefit is an adequate principle to illuminate a bright line within proper discretionary bounds for the setting of a NAAQS for a non-threshold pollutant under the CAA is effectively at issue in 99-1426 consolidated herewith on the Cross-Petition of American Trucking Associations, Inc., *et al.* The Parties think cost-benefit a sound principle without proceeding to argue this question. If cost-benefit, or some other intelligible principle, is identified by this Court, it could arguably moot the excessive delegation claims. The optimal order of this Court upon such a finding, as the Parties proceed to argue in the text, is to remand the statute to the agency noting the principle[s] abandoned during the suspect agency action which are to guide its decision on reconsideration.

submit that constitutional examination of the question at issue quickly reveals that the present will of Congress is far more compelling than the imaginary predilections of a future executive or the future waffling of an extant executive agent.

Thus the answer to the first question, not contradicted by the D.C. Circuit, is in the affirmative; and, without a finding of principle to bound the discretion which would govern a remand to the Agency, the proper course is measured statutory invalidation, *i.e.*, this Court should rule narrowly which in no way means a timid ruling.

Shifting the analysis from a purely constitutional one to policy grounds, the policy consequences of a remand for an agency to find an intelligible principle reveals a perverse incentive. Agencies would be invited to wink at the non-delegation doctrine in setting standards and only truly engage the search for intelligible principle if challenged.

Interestingly, deference to agency statutory interpretations arises out of the belief in agency "expertise", the agency's "intense familiarity with the history and purposes of the legislation at issue" and agency's "practical knowledge of what will best effectuate those purposes." Judicial Deference to Administrative Interpretations of Law, Scalia, Antonin, 1989 Duke Law Journal 511, 514 (1989). Where the agencies have articulated and interpreted "intelligible principles", not ignored or never found them, a certain latitude implied by "deference" has ensued to support those actions. Where EPA admits that there is no intelligible principle, the Parties do not see why that decision should receive any less deference.[9]

The EPA Administrator has gone to lengths in attempting to justify the policy decision of where to set the standard, but her arguments still reduce to: a lower standard would cause less health effects, a higher standard would cause more health effects (see *Trucking*, 175 F.3d at 1035). More damning, the

[9] Note, this casts the case in direct opposition to *Touby v. U.S.*, 500 U.S. 160 (1991), in which the petitioners conceded there was an "intelligible principle" but asked for a higher standard. The statement of "intelligible principle" in *Touby* is not exceedingly dissimilar from that facially at operation in the present matter, but the contention of the Parties is that the principle has evaporated in the context of its inconvenience of applicability to the present circumstances.

standard chosen is essentially said to be correct because it is the one chosen by the Administrator (see EPA brief, p. 29, "...no generalized paradigm...can substitute for the Administrator's careful and reasoned assessment" (quoting 62 Fed. Reg. at 38688)). The Parties beg to differ; "the administrator's ... reasoned assessment" must relate to an intelligible principle. EPA as much as admits that this is unregulated delegation.

Nonetheless, it is all disguised in the garb of rulemaking, and thus EPA claims the competence to decide the question of whether a rational effort to set a rule outside the bounds of discretion, or with ill-defined discretion to which the administrator will not even reliably adhere in the future, is a violation of the non-delegation doctrine. This implies that this Court ought not consider the constitutional matter *de novo*, or perhaps not even consider this a constitutional matter.

It is a rather incredible contention, if not unexpected in this day of burgeoning administrative government, that essentially seeks *Chevron* deference for executive constitutional interpretations, see *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Where shall the competency of this Court, or any other court, lie if not to set the constitutional line? Since this gambit raises the question of the standard of review to apply here the Parties proceed to address it.

V. Standard of Review

American Lung Association (ALA) argues that "[b]ecause the Clean Air Act plainly satisfies the non-delegation doctrine, the D.C. Circuit's constitutional inquiry should have stopped there — there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less a constitutionally based narrowing of that interpretation." ALA Brief, p. 12-13. This is, at minimum, an honest admission of the nature of the present case. It is a constitutional question.

The American Lung Association offers at length its belief in the rationality of the standard chosen. This avoids addressing the question presented. The question is not whether EPA chose the right standard; rather, it is whether they could have chosen

the right standard under the particular circumstances. This is not a review of the agency's action for arbitrary nature; indeed, the Parties concede that the procedural history or this rulemaking could insulate EPA from just such a challenge, even in the face of stronger arguments favoring a different standard. This is how the constitutional question is reached in the first place.[10]

EPA's rationale, rather than insulating it from constitutional challenge, invites it. If EPA's actions in the rulemaking were irrational, the constitutional question simply would not be reached. The logic does not, however, follow that simply because EPA may have acted rationally, it acted within constitutional bounds.[11] Thus the Parties agree with ALA that a constitutional question is at issue, but cannot agree that it was improperly reached.

It is a caricature of the founders' anticipated tension between the branches to suggest that executive agents should seek deference to their interpretation of a constitutional question, but the advantage of such possible deference is too much for EPA to forego without a vain attempt to shield itself under an Administrative Procedures Act (APA)-style review umbrella.

---

10 This distinguishes the present case from *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980) (*"Benzene"*). While this Court did not choose to reach then-Justice Rehnquist's quintessential concurrence on non-delegation, the Parties do no see *Benzene* as even remotely rejecting it since the question there could be readily resolved under a remand for unsupported, *i.e.*, arbitrary, decision. The constitutional question simply was not reached, Justice Rehnquist's passionate eloquence notwithstanding.

11 Common sense, *i.e.*, everyday rationality, is a rule long recognized as pertinent to the application of the non-delegation doctrine. "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense..." *J. W. Hampton, Jr., & Co. v. U. S.*, 276 U.S. 394, 406 (1928). "If Congress shall lay down by legislative act an intelligible principle to which the person or body is directed to conform, such legislative action is not a forbidden delegation of legislative power", *Id.* at 409.

This makes critical the question of what represents common sense for the purposes of this analysis. The Parties offer Justice Breyer's expressed belief that "...some risk is inevitable in any society and cannot be eliminated at reasonable cost. Thus, safety statutes must seek to eliminate *un*reasonable risk, *regardless* of their language", Breyer, Stephen, Regulation and its Reform, Harvard University Press, Cambridge, MA, 1982, p. 103 (emphasis added).

> "In the court's view, the Constitution requires that EPA supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the "right" level...That approach, however, is inconsistent with the court's limited role in reviewing NAAQS. The CAA makes clear that EPA's actions in setting NAAQS are subject to review under the arbitrary or capricious standards of judicial review. See 42 U.S.C. § 7607(d)(9)", EPA Brief, p.27, 37. (see also 5 U.S.C. § 706 (2) - APA review procedures identical to 42 U.S.C. § 7607 (d)(9))

The Parties believe that EPA has not taken great effort to obtain the perspective of the appeals court in order to announce what was in that court's view. Otherwise they would know that their proposition fails, because the appeals court simply was not reviewing the NAAQS, but whether the delegation of its establishment to EPA was properly bounded. This may be enlightened by EPA's statutory interpretations but is a constitutional question. Nowhere does the court demand of EPA the "right" level or suggest it wishes to substitute its judgment as to what the "right" level might be. It does not seek

---

11 cont. Such subtleties may seem to make further light of Justice Roberts' statement that "the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.", *U.S. v. Butler*, 297 U.S. 1, 62 (1936). Certainly, Justice Roberts was not advocating absurd outcomes when stating this self-evident maxim. It is axiomatic that if there are several choices within well bounded discretion attending a delegation of legislative power, a sure defense for the elimination of a given choice is an absurd outcome. It must, however, be demonstrable that the alternative choice[s] are legislatively permissible. Thus to avoid 'zero-risk', an absurd outcome as addressed both by Justice Breyer in Regulation and its Reform, cited, *infra*, and in the Parties' arguments at p. 10, n. 7, the only possible conclusion is that EPA implicitly considered other factors besides health effects to inform its health effect standard setting, and the only intelligible principle for such an exercise is cost-benefit analysis, see the Parties arguments at p. 11, n.8. If cost-benefit analysis is not available, and the absurd result may not be avoided within discretionary bounds, it is Congress which must reconcile the absurdity, not this Court or the Executive. Common sense is a proper tool to alert this Court when a potential absurdity may need to be resolved, but not a tool for determining where the power to resolve the absurdity constitutionally resides.

to determine whether the standard is arbitrary, but looks to see whether such a question may be answered, *e.g.*,

> "...Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of congress has been obeyed, would we be justified in overriding its [Congress's] choice of means for effecting its declared purpose..." *Yakus v. U.S.*, 321 U.S. 414, 425-426 (1944)

Thus the standard chosen by the D.C. Circuit is effectively that one which is viewed as having broken the dam of *Schechter*'s application. Therein it can be seen that *Schechter* was not discredited, but respected, by what are in effect its progeny.

If that respect has been loose or less than charitable as then-Justice Rehnquist suggested in his *Benzene* concurrence, see *Industrial Union Dept. v. American Petrol. Inst.*, 488 U.S. 607, 686 (1980), such animus never extended to vacating *Schechter*'s non-delegation maxim which is universally understood to attend the constitutional separation of powers. With *Schechter* squarely invoked, and its pedigree questioned, the Parties think some words must be said on its behalf.

VI. The Vitality of Non-Delegation

History suggests that *Schechter* is more damned by the nature of the case in controversy than by the jurisprudence of the decision. Surely, the constitutional doctrine of states rights was in public disrepute and, to an extent, the judicial doghouse for more than a century as the happenstance of having been invoked in *Dred Scott v. Sanford*, 60 U.S. 393 (1857). Yet the doctrine had nothing whatsoever to do with the disgraced and archaic notion of treating other people as property. Surely, but the least bit of substantive due process on Scott's behalf would have yielded a different result and thus struck the appropriate balance between federal and state powers. While history tells a different story in that case, it is most assuredly misplaced ire to condemn as inappreciative of civil rights the very doctrine

that the founders conceived of as analogous to the separation of powers and operating with it to insure those rights:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal] , and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.", Madison, James *Federalist No. 51*

Schechter, by comparison, has a lesser burden to carry. It's social offense was as a judicial roadblock to the New Deal. It is often taught that *Schechter* is the progeny of some intractable justices who would not let the nation take the strong medicine that President Roosevelt prescribed. As with *Dred Scott*, the Parties think the jurisprudence of *Schechter* falsely condemned for the linchpin character of its substance and timing. Few viewed it as worthy of condemnation when Chief Justice Taft had announced the "intelligible principle" requirement in 1928, see *J. W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928); but, he did so in approving a reasonably well defined, if presently viewed as economically quaint, delegation to customs officers to adjust tariffs according to the relative costs of production in the country of origin.

When *Schechter* came before the Court, even Justice Cardozo, who was the lone dissenter months earlier in the non-delegation invalidation of FDR's "hot oil" Executive Order issued pursuant to the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, saw "delegation running riot" in the "Live Poultry Code", *Schechter*, 295 U.S. at 553 (J. Cardozo, concurring). While the wage and labor provisions of the code have ultimately prevailed in other forms, the Parties do not anticipate any others to inveigh against invalidating the "straight killing" requirement, *i.e.*, that those purchasing poultry had to take the run of the coop. In other words, you couldn't pick the chickens you wanted to buy, nor could A.L.A. Schechter Poultry Co. sell you the chickens of your choice. If this is a requisite tenet of "fair competition" it was obviously a virtually

unbounded concept. Justice Cardozo described the expanse of the delegation as follows:

> "...a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well being or prosperity of the industry affected...If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code." *Ibid*

Amicus EDF hazards that *Schechter* is irrelevant since the regulations were effectively promulgated by private parties, *i.e.*, trade associations (see EDF Brief, p. 22). While the delegation to private individuals can be said to create conflict, members of the industry may also claim expertise. Few administrative agencies are conflict-free in terms of constituencies and factions they must serve, thus they are also attended by both conflict and expertise. Noble motives on the part of government actors were not the suspicion of the framers, thus the separation of powers to begin with. The relevant question in *Schechter*, as here, is not to whom the delegation is made, but whether an intelligible principle capable of definition bounds the delegation. In any event, the delegation in *Schechter* was effectively to the President who had to approve any interpretation.

While one can make light of the chicken killing requirements, the wage and hours provisions of the codes at issue remained a central contention within jurisprudence from the New Deal to the Great Society. In *Schechter*, these provisions were held inappropriate both on the grounds of "attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly...", *Id.* at 551[12]. Notably, when a federally chartered minimum wage was first found constitutional by this Court, see *U.S. v. Darby*, 312 U.S. 100 (1941), and *Opp Cotton Mills v. Administrator of W. and H.D.*, 312 U.S. 126

(1941), it applied only to businesses transacting across state lines, and was set by Congress at 25 cents per hour with a delegation allowing the Administrator of the Wage and Hour Division to increase the wage where merited, but this discretionary increase could not provide a wage in excess of 40 cents per hour (see Fair Labor Standards Act of 1938, 52 Stat. 1060). Thus, the Parties would describe this as a well bounded, i.e. less vague, delegation, albeit wide in the sense that it applied across the interstate economy of the entire country (see also *Mistretta v. U.S.*, 488 U.S. 361, 368 (1989), approving delegation to United States Sentencing Commission of the establishment of determinate sentencing guidelines where: "The maximum of the range ordinarily may not exceed the minimum by more than the greater of 25% or six months, and each sentence is to be within the limit provided by existing law." *Id.*). Of late, the Congress simply sets the minimum wage by statute. Rather than a repudiation of *Schechter*'s non-delegation doctrine, this is a virtual endorsement.

Schechter remained similarly inviolate as a matter of the historically recognized 'switch in time, that saved nine', referring primarily to a pair of watershed of rulings which cast the Court in a more accommodating light relative to New Deal undertakings. Neither of the rulings considered the pivot of the 'switch in time' implicated any change in the Court's view on non-delegation. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), approved a minimum wage statute of the State of Washington and is considered to have rent the cloth of substantive due process using as a shears the police powers of

---

12 While this theory of the commerce clause, Art. I, Sec. 8, U.S. Constitution, as a significant bar to federal action has arguably fallen a bit by the wayside since *Schechter*, it is the logical analog of the quite healthy judicial rule of "indirect effects" which insulated EPA's standard setting decision in the present matter from examination for the burdens of its effect under the Regulatory Flexibility Act, 5 U.S.C. § 601, and amendments to it under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 857-74, see *Trucking*, 175 F.3d at 1043-1045. Perhaps foreshadowing the debate over renewed vigor for the non-delegation trip wire, the high tide of commerce clause justification for sweeping federal mandates is receding as that under its ambit diminishes in consequence of recent precedents, *e.g.*, *U.S. v. Lopez*, 514 U.S. 549 (1995).

the state — not the federal government. Congressional delegations were not in issue. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), is strictly a commerce clause case (Art. I, Sec. 8, U.S. Constitution). While the action in controversy was a delegated action, no party argued, and the Court did not conceive, that dismissal of workers for labor organizing activities was not within a well bounded discretion described by "unfair labor practices". The question was whether circumstances fell under the ambit of federal jurisdiction. Thus delegation is only mentioned in passing with the indication that it is inapposite.

This is not to say that petitioner's camp does not fairly bring examples of suspect delegations that have survived judicial review. Kenneth Culp Davis does likewise in articulating what he conceived of as the "failure of non-delegation", see generally, Davis, Kenneth Culp, A New Approach to Delegation, 36 U. Chi. L. Rev. 712 (1969). Davis points to case studies of interstate trucking regulation, cable television regulation, and natural gas supplier regulation. Of these, two out of three have been essentially deregulated by Congress, arguably in consequence of the very failures he cites. Without proper control on delegation, the country evidently faces a boom and bust regulatory environment.

But, is a return to an effective non-delegation doctrine somehow as wild a swing of the pendulum as petitioners intimate as compared with the outcomes just described? The Parties do not think the measured step they urge hazards a "return" to any distinct legal sentiment, particularly some interpretation once rendering resistance to the New Deal. The Parties believe that the Court, whether the current Court or that of FDR's day, is to invoke the "common sense" discussed, *supra*, in cognizance of the force of its rulings and measure its steps so as to be seen as such, if not widely and substantively digested, by the citizenry.

VII. *Chevron* Begs *Schechter* —The Need for Non-Delegation

Justice Scalia has articulated why the idea of yielding judicial deference to the executive on ambiguous statutory interpretations is more sensible than it sounds on its face (see

Scalia, Antonin, Judicial Deference to Administrative Interpretations of Law, cited, *supra*). The Parties argue that, pursuant to *Chevron*, the regulatory ambit has increased to a point where the executive and independent agencies feel justified in dipping water from the legislative river, simply if they feel it rationally defensible. Such actions may be the providence of the most well-intentioned of executives, but the drink they seek may be attained constitutionally by running for legislative office. As Justice Scalia is also known for saying, the Constitution gives the Congress the power to make laws, not the power to make legislators.

The explicit requests here for *Chevron* deference to executive constitutional interpretations (see EPA Brief, p. 8; ALA Brief, p. 13; and *Amicus* New York's Brief, p. 20) and identical if implicit requests resulting from casting this matter as limited to an APA substantive review of agency action for arbitrary application of ambiguous statutory provisions (see EPA Brief, p. 27, 37; and *Amicus* EDF's brief, p. 5) indicate that the decision has created almost an artificial intelligence sort of vortex in the administrative agencies. In the mold of the idiomatic science fictional computer that is taught to think and then takes over its master, reflecting a theme coursing through literature from Shelley's Frankenstein to Clarke's 2001 A Space Odyssey, the agencies, once handed *Chevron*, have responded predictably to expand their influence over the other branches and over the country as a whole as EPA seeks in the present case. This does not make *Chevron* wrong, but demonstrates a system of checks that is out of balance.

What is needed here is not a return to pre-New Deal jurisprudence, but recognition that some more dormant theory of jurisprudence remains vibrant. *Schechter* has indeed slumbered, but is surely the needed linchpin to the checks and balances of administrative execution of legislative grants of authority. In fact, without such a reminder as this case is positioned to offer, administrative agencies, and even some courts are losing sight, in some important respects, of from whence the power they wield has come, *e.g.*, the Supreme Court of North Carolina recently ruled in a separation of powers case,

Wallace v. Bone, 286 S.E. 2d 79 (1982), that an Environmental Management Commission (EMC) which sets standards and promulgates rules is an administrative body and thus has "no relation to the function of the legislative branch of government", *Id.* at 88. The formalistic result in the case, finding it inappropriate for legislators to serve on this EMC, is not incredible; but the notion that standard setting and rulemaking, a portion of the administrative powers of the EMC have "no relation to the function of the legislative branch of government" is certainly as hostile to the separation of powers as legislators sitting on the EMC.

VIII. Separation of Powers Jurisprudence is, by Nature and Design, Formalistic.

There simply can be little rationale for formalistic attentions to the separation of powers in some arenas while not in others. The line-item veto (see generally, *Clinton v. New York* , 524 U.S. 417 (1998)) and the legislative veto (see generally, *INS v. Chada*, 462 U.S. 919 (1983)) have been vanquished through formalistic interpretations of this Court. Legislative delegation must be subject to the same rigors in order to uphold the values inherent in separation of powers.

Parties urge that the Court view the battle of *New York* in a context of Congress presenting to the President a spending bill which he may only veto in its entirety, however this bill contains the following caveat: "The President shall spend the allocated sums, or afford the contemplated tax relief only if he deems it requisite to the public welfare" (borrowing from 42 U.S.C. § 4709 (b)(2), although requisite to "the national interest" could surely substitute as it did in the discretionary condition precedent to exercise of the line-item veto, see 2 U.S.C. § 691(a)9A)(iii) (invalidated in *New York*)).

One cannot ensure appropriate separation of powers by closing off one avenue but leaving other areas for usurpation available. There can be little doubt that Congress passed the Line Item Veto Act, 2 U.S.C. § 691 (invalidated in *New York*), to solve that nettlesome problem of government, trimming the fat, that it was unable to accomplish itself. If this assistance of

the Executive were not available under the constitutional separation of powers because it would involve legislating by less than the constitutional algorithm of passage by both houses and presentment, is it no less legislating because it appears in the form of delegated executive action, rather than in a form internal to the legislative process?

The Parties do not deny that the President has certain, if limited, latitude in the expenditure of funds in operating his own executive and independent agencies, which is most often manifest in not actually spending allocated funds. It seems likely, though, that if the President failed to transmit funds to states or local entities to which funds had been allocated by Congress or if the President attempted to collect a tax which Congress had explicitly abated, and either action were defended in legal proceedings on the pretext of the aforementioned untethered delegation, that this Court should arrive at the same result it did in *New York*.

Likewise, one of the most logical mechanisms for regulating delegation, the legislative veto, is forsworn on the same grounds as the line-item veto, that it is an incomplete or improper making of law under Article I, Section 7 of the U.S. Constitution. Congress may only effect a legislative veto by legislating completely. A syllogistic exercise reveals that since an Executive veto of a legislative bill must be overridden by a two-thirds vote of both houses of Congress, and since a Congressional veto by complete legislation is aimed at Executive action; a Congressional override of agency action will require supermajoritarian rather than simple majoritarian support. In practice, the full legislative process is seldom applied to such a task as the risk of validating the very action which has raised Congress' ire is, ironically, significant, see *e.g.*, *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985) — withdrawal of congressional action against Executive interpretation later held relevant to judicial upholding of disputed interpretation.[13]

13 Decisions in the vein of *Riverside* implicitly insulate administrative conduct further still from congressional oversight. The Parties consider it highly suspect whether Congress actually intended the requirement for a permit to fill "navigable waters" to extend to land areas not subject to regular inundation when it

Thus the notion collapses that Congress may effectively regulate its delegations after the fact. While the mechanism theoretically exists, it cannot be viewed as providing the proper check on the bounds of discretion exercised by administrative agencies.

Thus, for the time being, this Court is the only forum in which an effective veto of legislative power unconstitutionally assumed by the executive or administrative agents may be had. The future may hold further refinements or improvements. Indeed the Parties note then-Judge Breyer's effective invitation to Congress to try what we term for these purposes the "legislative proto", see Breyer, Stephen, The Legislative Veto After *Chada*, 72 Georgetown Law Journal 785 (1984),

> "My [legislative] veto substitute...could replace veto provisions in present statutes with provisions that conditioned the legal effect of exercise of delegated authority on subsequent enactment of a confirmatory statute", *Id.* at 793.[14]

13 cont. passed Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Nonetheless, in resolving the apparent ambiguity the Court coupled the newly announced *Chevron* deference with the following thoughts of Justice White, writing for the Court:

> "Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.", *Riverside*, 474 U.S. at 137.

The significant peril that this hazards for Congress is manifest. If Congress examines statutory ambiguity as is clearly within its ambit, but fails a supermajoritarian effort at invalidating questionable adherence by an agency's statutory interpretation to Congressional intent — this effect not always being clear in a straight up vote, but perhaps manifesting itself as the abandonment of corrective language in committee or conference as a consequence of the futility of an eventual supermajoritarian test — Congress's failure to legislate an explicit correction will be held to virtually endorse the interpretation. On the other hand if the Congress acquiesces quietly to the standard over some time, a form of legislative *stare decisis* will attach. The Parties suggest that this presents a 'damned if they do and damned if they don't' choice which should be avoided.

14 Then-Judge Breyer posited that such an approach would most closely approximate the "legislative veto" if Congress were to adopt "fast-track" rules for consideration of such confirmatory statutes. Even if Justice Breyer

We believe this a manifestly sensible recommendation, both generally, and in the present case. Congress could obviously use such a mechanism for the reconciliation of ambiguities that would properly bound *Chevron* deference in statutory interpretations. Then-Judge Breyer imagined that it might obviate the principal function of judicial review of agency actions, *i.e.*, determining whether they are arbitrary when held up against the statute under which they are taken, see *Id.* at 795. Since the rules themselves, which would be confirmed by statute, are then subject to agency "policies and practices" the Parties believe that the confirmatory statute idea does not hazard a work shortage for jurists.

In such a "legislative proto" world, the courts would be more free to concentrate on the issues of enforcement discretion which Kenneth Culp Davis tends to commingle with non-delegation problems (see generally Davis, Kenneth Culp, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969), esp. Chapter IV. Judicial Acquiescence in Administrative Exercise of Ungranted Power, *Id.* at 722-725). The Parties agree that selective enforcement and prosecutorial discretion go begging for redress as surely today as they did in 1969; however, these are preponderantly issues of performance of clearly executive duties, not those delegated to the agency by the legislature. It clouds the issue to reach purely executive discretion when examining discretionary grants of legislative power.

The Parties are, in fact, so impressed with the idea of the "legislative proto" that they essentially ask this Court to effect the judicial equivalent for the constitutional question before it (one that the Parties acknowledge would likely seldom be reached if the "legislative proto" were in place in this and other statutes). Thus the Parties encourage this Court to answer the

14 cont. posited this substitute more as an abstract constitutional proposition than a policy prerogative, the parties view the mechanism as a more systematic approach offering the potential to overcome some of the deficiencies that Justice Breyer apparently sees in looking to Congress for improvements in regulatory outcomes that speak to "a public that 'really' wants an overall result that differs from the substance-specific preferences revealed on particular occasions", Breyer, Stephen, Breaking the Vicious Circle: Toward Effective Risk Regulation, Harvard University Press, Cambridge, MA, 1993, p. 55, 57

first question presented in the affirmative and remand the statute in the narrow context of the rulemaking at issue here to Congress for a confirmatory statute, or other action or inaction of its choosing. For now, that is the only way to protect the Constitution in the present context. Judicial restraint would otherwise be mistakenly exercised to 'save' this statute in the narrow context in which its validity is here in question. This is the solution accomplishing the main purpose of the non-delegation doctrine.

> "[to] ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will", *Benzene*, 448 U.S. 607, 685 (Rehnquist, J., concurring).

IX. A narrow but firm decision will have limited, measured and necessary effects.

At the time, governmental calamity was widely if hyperbolically suggested as a result of the formalistic holdings in *Chada*. Almost a generation later, it appears more a legislative speed bump than a roadblock. While a proper and deliberate alternative to the legislative veto has taken its time appearing — and to the extent that it exists is reflected by, *inter alia*, the Regulatory Flexibility Act, 5 U.S.C. § 601, which, ironically, were avoided in the present rulemaking — no one would allege that civil society is on the brink of collapse as a result.

The Parties admit that reaffirming the lines between executive and legislative power in the non-delegation context will be ritualistically condemned by some as unappreciative of the complexities of modern society. But, the Parties favor replacing neither the constitutional system nor the jury system, both of which have been subject to criticisms of their contemporary relevance in a post-industrial age, with a tyranny of technocracy.[15] Still, one must address whether the practical result of the narrow holdings the Parties beg would somehow

[15] Then-Judge Breyer recognized that early administrative thinkers at the time of the New Deal saw the possibility that regulation itself, as opposed to portions of its substance, would become its own "science", including self-imposed discipline:

hazard wide upheaval inversely proportional to their focus.

The Parties suppose that petitioners' camp, who essentially beg that this Court reverse the D.C. Circuit by finding their policy imperatives superior to time-worn constitutional bounds, would be aghast at the answer the Parties propose. But Parties doubt unwarranted impacts from ruling narrowly yet still firmly. No assault has been made on the existing standard, nor any suggestion that it and other standards would evaporate as a matter of the precise considerations here. Not only has the former standard stood unchallenged for some time giving it that measure of legislative *stare decisis*, all would likely admit, but it has been explicitly articulated by Congress in the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 42 U.S.C. § 7511(a)(1). That is not to say that it was never conceived that EPA would revise the standard, but that EPA was certainly envisioned to so do within constitutional bounds. Narrow invalidity for the new standard will clearly leave the former standard as protection.

15 cont. "In place of legal procedures and safeguards, defenders of the New Deal agencies relied upon the expert professionalism of administrators...The legitimacy of their decisions would rest upon their "scientific" correctness.", Breyer, Stephen, Regulation and its Reform, Harvard University Press, Cambridge, MA, 1982, p. 351 (referencing Landis, J., The Administrative Process, New Haven, CT 1938).

Justice Breyer has also noticed that this notion, and the subsequent notion of the 1940's and the 1950's that "fair and open procedures, as embodied in the Administrative Procedures Act [Act of June 11, 1946, ch. 324, 60 Stat. 237], would keep agency power in check" have both been unfulfilled. See Breyer, Stephen, The Legislative Veto after *Chada*, 72 Georgetown L. J. 785, 796 (1984). Even if one viewed the "scientific managerialism" model of the 1930s as even somewhat relevant, it vacates the very model of agency expertise in the present matter. EPA itself admits that the standard revision presently at issue involves trading health effects, and indeed lives, for practicality. This is a moral, not scientific conundrum.

It is remotely conceivable that Congress could have set up some kind of philosophical review authority to interpret "an adequate margin of safety" in an ethical context; but Congress did not do so. This imaginary moral authority could certainly create facial non-delegation problems; although, its area of expertise would, at least theoretically, be suitable to the decision required here. That said, it is a proposition manifestly contrary to our system of government. Be they Rhodes Scholars or rogues, this country selects its policy leaders through congressional elections. Science should inform policy, not make it.

This is also true for particulate matter, PM 10, for which a current standard exists. However, one might argue that this is the first standard setting for small particulate matter, *i.e.*, PM 2.5 — albeit PM 2.5 is, to some effect, included in PM 10. Assuming, *arguendo*, however that the standard at issue is a non-existing standard, the consequence of invalidating the rule is merely delaying it for a time to see if Congress will provide it some structure, but the rule has never existed for the 30 years of the CAA. This is not somehow the upsetting of 30 years of settled enforcement.

Thus it can be seen that when inquiring into the impact of this narrow statutory invalidation, where the action in question conceives of a new standard or plan, no long-standing program is at hazard. Where a long-standing standard or program exists and some rule or revision exceeds discretionary bounds, meriting a similar fate to that which the Parties urge for the rule here, the long-standing rule or program remains in place.

Thus a decision to find the statute narrowly invalid, as interpreted, with respect to this rulemaking and remanding it to Congress for some confirmatory or clarifying statute actually has very little effect on the execution of government programs.

It may be argued that a danger exists that Congress will not confirm the rule. To argue this in the particular case is to admit to a usurpation of congressional authority in a way for which the Agency is unsure it could obtain congressional endorsement. Of course, in this situation, the shoe is properly on the other foot. The current situation is that Congress is simply understood as having endorsed the interpretation whether it does nothing or whether it fails at a legislative attempt to overturn it (see the Parties' arguments at p. 23-24, n. 13, *supra*).

The truly old saw in this regard is that Congress simply does not have the time or expertise to make the necessary rules. That does not justify usurpation and it presupposes to an extent that Congress would start afresh, without the benefit of the public debate attending the invalidated rulemaking process to inform its own deliberations. Even with an administrative record, it is certain that congressional undertakings are no mean feat; but neither is there any evidence that Congress cannot and

will not act with dispatch when the social policy at stake demands it. Congress's failure to act in whatever time frame can justly be interpreted as lacking the very will that agencies so often claim to be carrying out. The Parties suggest that where there is no will, there is no way.

We must truly defer, in the realm of whether more effective congressional engagement in writing or confirming rules to avoid excessive delegation somehow hazards the end of civil government, to the preeminent scholar in this regard. With no impoliteness intended to Kenneth Culp Davis whose work the EDF believes informed the direction of the appeals court (see EDF Brief, p. 6), the Parties must recommend instead David Schoenbrod as a scholarly authority who argues succinctly and on point that "Congress Has Enough Time to Make the Laws". In fact he devotes an entire chapter of his seminal work Power Without Responsibility, How Congress Abuses the People Through Delegation (Yale University Press, New Haven, 1993), to just this proposition (see pp. 135-152).

Reference to the importance of Schoenbrod's work by the Parties is critical beyond their respect for his scholarship. As groups composed of resource workers, property owners and recreators who strongly believe that excessive delegation of legislative power, or its corollary usurpation by the executive, has infringed property rights, limited multiple use of public lands, and has damaged communities and undercut rural industriousness, the Parties see an executive that has overreached. This is the Parties' admitted motivation in appearing here, but as a consequence of the focus of their activism on advancing property rights, sustainable resource exploitation and public lands access, the Parties are inappropriately but unavoidably conceived of by policy adversaries as not valuing environmental quality in the pursuit of their objectives. Schoenbrod, on the other hand, whose work the Parties recommend to the Court in resolving this matter, is effectively the Parties' complement, focusing on environmental quality that may go begging as a result of excessive delegation:

"As a student during the 1960s, I spent my summers working for the perfect apostle of the New Deal, Hubert Humphrey, and aspired someday to sit in Congress or run an agency that, in the New Deal mold, would make laws. By the 1970s, like much of my generation, I had come to distrust agencies, and served as one of the leaders of the Natural Resources Defense Council, a non-profit corporation that pressured agencies to make laws that would fulfill the promises of environmental statutes. That experience made me see statutes that delegate as a way for politicians to play to the grandstand rather than to make the hard choices needed to protect the public. It started me wondering whether the public really benefits from delegation. Seeking an answer to that question, I became a legal scholar.

I now believe that delegation has produced a regulatory system so cumbersome that it cannot provide the protection that people do need, so large that it needlessly stifles the economy, and so complex that it keeps voters from knowing whom to hold accountable for the consequences." *Id.* at ix-x.

Schoenbrod's work is a significant testament to how limited delegation can work, garnering praise from reviewers as disparate as former Senator Bill Bradley and Judge Robert H. Bork. Schoenbrod's ideas are not gospel despite the metaphor, and certainly should be subject to the rigors of the very governmental processes he would improve. This debate, however, will never be meaningfully joined without this Court's willingness to force the hands of the players.

CONCLUSION — A narrow but firm holding is called for.

In consideration of the foregoing, the Parties urge that this Court answer question one as presented in the affirmative and, in so doing, declare Section 109 of the Clean Air Act, 42 U.S.C. § 4709, unconstitutional and void as interpreted by EPA with respect to any revision of the ozone and particulate matter standards.

Respectfully submitted.

CHRISTOPHER C. HORNER
Counsel of Record
and Counsel for Amici Curiae
813 Duke Street
Alexandria, Virginia 22314
(703) 549-7989

Supreme Court, U.S.
FILED
OCT 5 2000
CLERK

(40)

No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attys. General, N.J.
Richard J. Hughes Justice
Complex 7th Floor
P.O. Box 093
Trenton, NJ 08625
(609) 633-8109, 984-5612

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

EDWARD G. BOHLEN
Assistant Atty. General, Mass.
200 Portland Street
Boston, MA 02114
(617) 727-2200, ext. 3358

LISA HEINZERLING
Counsel of Record
Georgetown Univ. Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-9115

27pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION 2

A. The Nondelegation Doctrine Does Not Require Cost-Benefit Balancing 3

B. Respondents' Failure to Specify the Kind of Cost-Benefit Test They Would Require Under the Clean Air Act Strips Their Test of Any Meaningful Content 6

C. Respondents Overstate the Determinacy of Cost-Benefit Analysis 7

D. The Nondelegation Doctrine Does Not Mandate a Single Approach to Establishing a Margin of Safety, Nor Does it Prohibit Regulation in the Face of Scientific Uncertainty 9

II. EPA MAY ISSUE REVISED OZONE NAAQS, DESIGNATE AREAS AS NONATTAINMENT UNDER THE REVISED NAAQS, AND IMPLEMENT THE REVISED NAAQS 13

A. Respondents Improperly Seek to Enlarge the Judgment They Obtained Below by Asking This Court to Vacate the Revised Ozone NAAQS . 13

B. The Clean Air Act Permits EPA to Revise the Ozone Standard that Existed in 1990 14

C. Subpart 2 of the Clean Air Act Does Not Constrain EPA's Authority to Implement the Revised Ozone NAAQS 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

American Lung Assn. v. EPA, 134 F.3d 388 (D.C. Cir. 1998) . 4

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 3

American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) 5, 6

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) 5

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 14

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 4

Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) 5

International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA, 938 F.2d 1310 (D.C. Cir. 1991) 8

Lichter v. United States, 334 U.S. 742 (1948) 11

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 14

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) 12

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) . 14

TVA v. Hill, 437 U.S. 153 (1978) 5

Statutes:

15 U.S.C. 2605(c)(1) 7

16 U.S.C. 1536 5

21 U.S.C. 346a(b)(2)(B)(iii)(I)-(II) 7

21 U.S.C. 360c(a)(2) 6

33 U.S.C. 1314(b)(1)(B) 6

42 U.S.C. 300g-1(b)(6)(A), (b)(3)(C)(iii) 7

42 U.S.C. 7407(d)(1) 19, 20

42 U.S.C. 7408-7409 18

42 U.S.C. 7409(b) 12, 16

42 U.S.C. 7409(d)(1) 15

42 U.S.C. 7502(e) 15

42 U.S.C. 7511-7511f 13

42 U.S.C. 7511(a)(1) 17, 19

42 U.S.C. 7511f 16

42 U.S.C. 7548 16

42 U.S.C. 7491-7492 16

42 U.S.C. 7612 16

Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 19

Other Sources:

62 Fed. Reg. 38,652 (1997) 9, 10

H.R. 2323, 101st Cong., Section 181(e) (1989) 15

S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) 12

Julie Graham, Don M. Shakow & Christopher Cyr, *Risk Compensation–In Theory and Practice*, 25 Envt. 14 (Feb. 1983) 9

W. Kip Viscusi, Wesley A. Magat & Joel Huber, *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. Econ. 476 (1987) 9

Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, Closure Letter to Hon. Carol M. Browner (Nov. 30, 1995), <www.epa.gov/science1/casac02.pdf> 10

REPLY BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

1. Respondents argue that if section 109 of the Clean Air Act were reinterpreted to permit the open-ended balancing of "all logically relevant factors," the constitutional defect they perceive in the statute would disappear. ATA Br. 11; *see also* APC Br. 34 (agency must consider "overall impact of its decision on society"). Respondents' constitutional argument thus amounts to this: section 109 of the Clean Air Act, as interpreted by the Environmental Protection Agency (EPA) for thirty years, effects an unconstitutional delegation of legislative power because it does not confer sufficient discretion on the agency. This is, to say the least, an unusual reworking of a constitutional doctrine designed to cabin rather than enlarge agency discretion.

Respondents' counterintuitive argument rests on a misinterpretation of this Court's decisions under the nondelegation doctrine and on a series of erroneous factual premises. In legal terms, respondents err by claiming that the Constitution requires cost-benefit balancing. In factual terms, respondents err by embracing untenable assumptions about the monolithism and determinacy of cost-benefit balancing. They also erroneously suggest that regulating in the face of scientific uncertainty creates problems of constitutional dimension.

2. On the statutory issue involved in this case, respondents improperly seek to enlarge the judgment they received below, without petitioning for certiorari. They ask this Court to vacate the revised NAAQS for ozone rather than, as the court of appeals did, leave them in place. Respondents argue, contrary to the court of appeals' ruling, that EPA was not authorized even to *revise* the ozone NAAQS in light of new scientific evidence of ozone's harmfulness. Because EPA was not permitted to revise the ozone standards, it follows that the

agency may not implement the revised standards. Respondents' legal premise is mistaken; the Clean Air Act not only permits, but requires, EPA to revise the NAAQS for all of the pollutants regulated under this program in light of changing scientific knowledge of the harmfulness of these pollutants. Once EPA's authority to revise the NAAQS is acknowledged, its authority to implement revised standards follows naturally from the language of the statute.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION

As we set forth in our opening brief in this case, the Clean Air Act is plainly constitutional under this Court's precedents. The Act places numerous significant constraints on EPA's discretion in setting the NAAQS: it prescribes the factors EPA may and may not consider; requires a margin of safety as an antidote to scientific uncertainty; limits the range of pollutants regulated by the NAAQS program; limits the life span of each NAAQS; and imposes large procedural constraints on EPA's decisionmaking, including an intensive process of scientific review. Congress has thus made the most basic and important decisions that arise in setting air quality standards. Not only that, it has done so through a close collaboration and dialogue with the executive regarding the many challenges that arise in setting NAAQS. Because EPA has always recognized these manifold constraints on its discretion, EPA's *interpretation* of the Act is constitutional as well. Mass. & NJ Br., No. 99-1257, at 7-19, 28-43. Respondents' arguments to the contrary are wholly unpersuasive. Thus the nondelegation doctrine should be used neither to invalidate the Clean Air Act and EPA's longstanding interpretation of it nor to justify interpreting the statute to require, contrary to its plain language, cost-benefit

balancing.

A. The Nondelegation Doctrine Does Not Require Cost-Benefit Balancing

Remarkably, respondents do not discuss the Clean Air Act itself in arguing that the statute is unconstitutional as construed by EPA for thirty years. The sections of respondents' briefs discussing the constitutional issue contain only the most glancing references to specific provisions of the Act. ATA Br. 7-25; APC Br. 22-35. Rather than tackling the language, purpose, history, and context of the statute, as this Court's precedents on delegation instruct, *see, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946), respondents argue that the Clean Air Act cannot be constitutional so long as it precludes EPA from balancing "all logically relevant factors," including costs, in setting the NAAQS. ATA Br. 11; APC Br. 34. This Court has never held that cost-benefit balancing is constitutionally required, and it should not do so now. Indeed, it would be most odd to mandate open-ended balancing by agencies in the name of the nondelegation doctrine.

Respondents ATA, *et al.*, premise their argument on a misreading of this Court's cases upholding rate-setting and price-fixing statutes.[1] ATA Br. 12-14. Respondents rely

---

[1]For their part, Appalachian Power Co., *et al.*, argue in favor of a balancing requirement by asserting that EPA simply cannot explain its decisions setting the NAAQS in the absence of such balancing. APC Br. 22-35. These respondents are, understandably, equivocal about the constitutional status of their argument; they concede that their claim might actually find its home in the "arbitrary and capricious" standard of the Administrative Procedure Act (APA). APC Br. 23. Respondents Appalachian Power, *et al.*, have succeeded in completely conflating the delegation doctrine and review under the APA. Respondents ATA, *et al.*, also often fail to perceive the

particularly on this Court's decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), which upheld the Federal Power Commission's (FPC) authority to fix natural gas rates according to the "prudent investment" method of rate-making. Respondents argue that *Hope Natural Gas* stands for the proposition that the nondelegation doctrine requires "a weighing of competing interests." ATA Br. 16. Respondents are mistaken.

The statutes at issue in *Hope Natural Gas* and other cases cited by respondents explicitly focused the agencies' attention on the consideration of costs. *See, e.g., Hope Natural Gas*, 320 U.S. at 600-01 & n. 8. The Clean Air Act, in contrast, *precludes* the EPA from considering costs in setting the NAAQS. Mass. & NJ Br., No. 99-1426, at 15-37. The observation that setting rates for natural gas involved "a balancing of the investor and the consumer interests" (*Hope Natural Gas*, 320 U.S. at 603, quoted in ATA Br. 13), thus means little in this case, where the statute at issue does not call for such balancing. Moreover, *Hope Natural Gas* was not even a nondelegation case: the only constitutional question posed in that case was whether rates set according to the "prudent investment" method were confiscatory under the Fifth Amendment. 320 U.S. at 601. Respondents' attempt to create, based on *Hope Natural Gas* and

---

distinction between the Constitution and the APA. ATA Br. 17 (citing APA cases as if they were constitutional cases), 18-21 (discussing details of rulemaking record). On respondents' legal theory, every garden-variety failure-to-explain case in administrative law would assume constitutional status. The Court should reject the call for such a radical expansion of constitutional doctrine.

Respondents Appalachian Power Co., *et al.*, also wrongly claim that judicial review is impossible absent a cost-benefit balancing framework. Bizarrely, they rely on a case in which EPA *lost* a judicial challenge to a NAAQS under the arbitrary-and-capricious standard in arguing that judicial review is impossible under EPA's longstanding interpretation of the Clean Air Act. APC Br. 30, citing *American Lung Assn. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).

like cases, a constitutional requirement that agencies consider "all logically relevant factors," ATA Br. 11, must fail.[2]

Ironically, under respondents' reworking of the nondelegation doctrine, Congress would find itself in more trouble, the more it attempted to constrain discretion by limiting the factors an agency may consider. On respondents' theory, for example, section 7 of the Endangered Species Act, 16 U.S.C. 1536, must effect an unconstitutional delegation of legislative power because it requires federal agencies to shape their actions according to their effect on the continued existence of protected species, without regard to cost. *TVA v. Hill*, 437 U.S. 153, 172-88 (1978). Similarly, if respondents are correct, then this Court *created* a constitutional problem when it interpreted the Occupational Safety and Health Act (OSHAct) to require the Occupational Safety and Health Administration (OSHA) to find a "significant risk" (without considering cost) before regulating workplace toxins. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639-40 (1980); *see also American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 505 n. 25 (1981) (approving OSHA's health-based method for finding significant health hazard).[3]

---

[2]Respondents' argument also runs counter to this Court's jurisprudence of statutory interpretation. This Court has made clear that agencies ought not ignore statutory limits on the factors they may consider in regulating. Thus, in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), for example, the Court invalidated a rule of the Federal Communications Commission, finding that the rule effectively ignored statutory limits on the circumstances under which the agency could require access to elements of the telecommunications network of a local exchange carrier. *Id.* at 388-89. Far from supporting respondents' position, as respondents suggest (ATA Br. 10, 17; APC Br. 25, 35), *Iowa Utilities Board* undermines their plea to have this Court ignore the Clean Air Act's limits on the factors EPA may consider in setting the NAAQS.

[3]Like the Clean Air Act, the OSHAct requires the consideration of

In sum, not only would a good deal of federal legislation be open to the courts' disapproval under respondents' view, but it would be open to such disapproval on the ground that it *confined* agency discretion through limitations on the factors agencies could consider. This topsy-turvy understanding of the nondelegation doctrine should be rejected.

B. Respondents' Failure to Specify the Kind of Cost-Benefit Test They Would Require Under the Clean Air Act Strips Their Test of Any Meaningful Content

There is another deep irony in respondents' position. While respondents castigate the Administrator for failing to provide what they regard as "a governing principle" for setting the NAAQS, ATA Br. 4, respondents themselves do not explain what type of cost-benefit balancing they perceive in the Clean Air Act. Balancing tests can come in a wide array of forms. The standards set under these different frameworks will vary considerably. Respondents' argument that a simple directive to EPA to "consider[] costs and other countervailing factors," ATA Br., No. 99-1426, at 50, will somehow provide determinate results is built upon the mistaken premise that cost-benefit balancing is a monolithic methodology.

Balancing tests in health and safety regulation cover a vast territory. They include quite traditional "command-and-control" regulation, mandating the use of particular technologies, *see* Clean Water Act, 33 U.S.C. 1314(b)(1)(B); regulation comparing the risks of not regulating with the risks of regulating, *see* Food, Drug, and Cosmetic Act, 21 U.S.C. 360c(a)(2), Food Quality Protection Act of 1996, 21 U.S.C.

---

costs in determining exactly what requirements will be imposed on individual sources of risk. *Cotton Dust*, 452 U.S. at 508-09 (feasibility analysis required in setting workplace standards); Mass. & NJ Br., No. 99-1426, at 24-28 (discussing manifold ways in which costs and feasibility relevant to decisions implementing the NAAQS).

346a(b)(2)(B)(iii)(I)-(II); open-ended balancing of a wide range of factors, *see* Toxic Substances Control Act, 15 U.S.C. 2605(c)(1); and regulation based on formal cost-benefit analysis and consumer willingness to pay for reductions in health risks, *see* Safe Drinking Water Act Amendments of 1996, 42 U.S.C. 300g-1(b)(6)(A), (b)(3)(C)(iii).

Thus, where Congress has called for balancing in standard-setting, it has chosen from a wide array of options and has tailored the balancing to fit the specific circumstances at hand. Because the Clean Air Act does not provide for the consideration of costs in setting the NAAQS, *see* Mass. & NJ Br., No. 99-1426, respondents cannot tell this Court what sort of cost-benefit balancing should be required under the Act.

Congress's failure to identify a specific kind of cost-benefit balancing in section 109 of the Act bolsters the conclusion that Congress simply did not permit such balancing to occur in setting the NAAQS. Moreover, respondents' consequent inability, themselves, to identify the nature of the balancing they have in mind unravels their argument that their reinterpretation of the Act would limit EPA's discretion. Faced with respondents' suggested directive–to "consider all logically relevant factors" in setting the NAAQS, ATA Br. 11–EPA would be free to do anything from setting technology-based, command-and-control-style regulations, to balancing risk against risk, to ceasing regulation at the point where the people hurt by air pollution were unwilling to pay the amount it would cost to prevent the pollution that hurt them. Clearly, it is not a limit on agency *discretion* that respondents are after; it is merely a limit on *regulation* that they desire.[4]

C. Respondents Overstate the Determinacy of Cost-

---

[4]Amicus General Electric now concedes that the cost-benefit balancing that it devoted a separate brief (in No. 99-1426) to defending would not fix the nondelegation problem as GE sees it. GE Am. Br. 30, n. 8.

Benefit Analysis

Although respondents shy away from explicitly identifying the kind of cost-benefit balancing they would require in setting the NAAQS, they occasionally hint that formal cost-benefit analysis is what they have in mind. For example, respondents ATA, *et al.*, cite with approval the D.C. Circuit's opinion in *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (*Lockout/Tagout I*), ATA Br. at 22, which suggested that OSHA could avoid the invalidation of the safety-related provisions of the OSHAct on nondelegation grounds by interpreting those provisions to allow cost-benefit analysis. 938 F.2d at 1316-21. While respondents imply that the kind of analysis the court contemplated was nothing more than Benjamin Franklin's "moral or prudential algebra" (ATA Br. 22), this quaint description vastly understates the contentiousness and complexity of the cost-benefit analysis the court had in mind.

Writing for the court in *Lockout/Tagout I*, Judge Williams explained what he meant by cost-benefit analysis: "Cost-benefit analysis requires identifying values for lost years of human life and for suffering and other losses from non-fatal injuries." 938 F.2d at 1320. What the court failed to appreciate is that the potential "range of values," *id.*, for human life and human suffering is vast, perhaps even infinite, even when these values are determined by considering individuals' willingness to bargain for risk-related benefits.[5] Sometimes, for example, people simply refuse to participate in markets for risks to human life; in one study, researchers found that the

[5]In a concurrence to his own panel opinion, Judge Williams further elaborated on the process of setting a "numerical value on human life," noting that "[p]reference-based techniques are a commonly used approach, but are subject to such pitfalls as wealth bias, age bias and inconsistency." *Lockout/Tagout* I, 938 F.2d at 1326 & n. 1 (citation omitted).

majority of parents asked how steep a price discount they would require to accept riskier household products responded that they would not buy the products at all.[6] Other researchers have found, in contrast, that some workers receive no extra wage for riskier work; such results imply that, in some cases, enhanced risk has *zero* value in the marketplace.[7] "Willingness to pay" values for human life thus might plausibly range from zero to priceless. The bare requirement of cost-benefit analysis thus arguably *enlarges* rather than constricts the range of permissible agency responses to matters of life and death. Indeed, respondents themselves showcase the vast degree of discretion afforded an agency under a cost-benefit standard. ATA Br. 23.

D. The Nondelegation Doctrine Does Not Mandate a Single Approach to Establishing a Margin of Safety, Nor Does it Prohibit Regulation in the Face of Scientific Uncertainty

In promulgating the NAAQS at issue here, the Administrator emphasized the different issues and challenges that arise in setting NAAQS for different air pollutants. Because the air pollutants regulated by the NAAQS program cause very different kinds of health effects, and because estimates of these health effects are surrounded by different kinds and degrees of scientific uncertainty, the Administrator concluded that she could not identify one single correct approach to setting the margin of safety for all criteria air pollutants. NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,883 (1997). In remarks that play a prominent role in

[6]*See* W. Kip Viscusi, Wesley A. Magat & Joel Huber, *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. Econ. 476, 477 (1987).

[7]*See* Julie Graham, Don M. Shakow & Christopher Cyr, *Risk Compensation–In Theory and Practice*, 25 Envt. 14, 19-20 (Feb. 1983).

respondents' briefing, the Administrator disclaimed an obligation and even a capacity to set margins of safety based on a "generalized paradigm" and instead acknowledged that setting margins of safety was "largely judgmental in nature" and "may not be amenable to quantification. . ." *Id.* The Administrator noted that it would be particularly inappropriate to adopt an approach to seting margins of safety that assumed that air pollutants cease to have an adverse effect on public health below a certainthreshold level, if in fact no such threshold level has been proven. *Id.*

Respondents cite these snippets from the record as evidence of the unconstitutionality of EPA's decisions under the nondelegation doctrine. ATA Br. 5, 11, 17; APC Br. 21, 27.[8]

---

[8]Respondents Appalachian Power, *et al.*, also assertthat the scientific evidence before EPA showed that there was no reevant difference between alternative ozone levels. APC Br. 8-9, 26-27. In support of this contention, respondents quote the Clean Air Scientific Advisory Committee's (CASAC) "closure letter" on the ozone standard, which stated that "there is no 'bright line' which distinguishes any of the proposed standards (either the level of the number of exceed[a]nces) as being significantly more protective of public health." APC Br. 8. In a portion of the letter not cited by respondents, CASAC went on to observe that the differences among the alternative standards did appear "considerable" when viewed from the perspective of the *absolute number of excess hospital admissions due to ozone.* Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, Closure Letter to Hon. Carol M. Browner (Nov. 30, 1995), <www.epa.gov/science1/casac02.pdf>. Thus, CASAC concluded, the choice between the standards turned on a "policy judgment" as to whether the *percentage of total asthma admissions (due to any cause) represented by the admissions due to ozone,* or the *absolute number of hospital admissions due to ozone,* was the relevant regulatory determinant. *Id.* Contrary to respondents' assertons, CASAC did not suggest that there was no difference between the alternative ozone standards; rather, it observed that the perceived magnitude of the difference between the standards depended on one's view of the

This argument comes in three parts. First, respondents imply that EPA must specify a single method for determining margins of safety. ATA Br. 11. Second, respondents ATA, *et al.*, argue that the approach EPA chooses in setting margins of safety *must* include the identification of a safe threshold for the relevant pollutant. ATA Br. 19 (EPA may not regulate criteria air pollutants unless it "affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point ... "); *see also id.* at 18. Finally, respondents argue that if EPA has not determined a safe threshold for an air pollutant, its regulation of that pollutant will of necessity be unprincipled. ATA Br. 18-19.

Each of these arguments misses the mark. First of all, this Court has never used the nondelegation doctrine as a lever for requiring an administrative agency to adopt a particular rulemaking formula or methodology. In rejecting such an approach in *Lichter v. United States,* 334 U.S. 742 (1948), this Court observed:

> It is not necessary the Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.

Id. at 785. In faulting EPA for failing to adopt one single approach to establishing margins of safety for very different air pollutants, respondents would require just the "specific formula" that this Court has held is not constitutionally required.

Second, ATA's claim that EPA must find a threshold for every criteria air pollutant in order to avoid constitutional invalidation amounts to an argument that EPA may not regulate in the face of scientific uncertainty. As the Department of Health, Education, and Welfare (HEW) recognized in the very first criteria documents that, at

---

relevant public policies.

Congress's direction, formed the basis of the very first NAAQS, it is typically not possible to identify a single "safe" (or "threshold") level of air pollution. Mass. & NJ Br., No. 99-1257, at 14-18. Respondents' argument that EPA must identify a threshold for the criteria air pollutants would effectively shut down the NAAQS program because it would require from science an answer that science seldom can provide. Respondents would thus forbid Congress from delegating lawmaking authority to an agency where, as is frequently the case, the agency must exercise its policy judgment based on evidence that is scientifically uncertain. Nothing in this Court's nondelegation jurisprudence requires such a result. Indeed, this Court's delegation cases are pervaded with cautious recognition of the fact that too severe an approach to questions of delegation might stop the government in its tracks. *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Finally, respondents are mistaken in suggesting that any approach to setting margins of safety that does not include the establishment of a safe threshold for each pollutant will necessarily be unprincipled. ATA Br. 18-19. In the rulemaking proceedings at issue here, EPA's observation that particulate matter and ozone may be "nonthreshold" pollutants was nothing more than an admission that the agency had not proven the existence of a level at which these pollutants had no effects on human health. It was not a claim that the agency had shown that these pollutants *do* have effects on human health at every concentration level above zero. It was not a claim that the agency would regard all such effects on health, if detected, to be sufficiently "adverse" to warrant a regulatory response. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970). Nor was it a claim that the agency would regard all such effects to be effects on *public* health within the meaning of the Clean Air Act. 42 U.S.C. 7409(b)(1). Thus, even where a safe level (a "threshold") for a pollutant has not been proven, EPA still may, nonarbitrarily, set the NAAQS for that pollutant

based on its judgment with respect to such factors as uncertainties surrounding the evidence of health effects, the adverse nature of the detectable effects, and the size of the population affected. And indeed that is exactly the process EPA has followed in thirty years of regulation under the NAAQS program. Nothing in this Court's jurisprudence of delegation forbids administrative agencies to make judgments involving science and policy. Indeed, that is the very essence of the modern administrative state.

II. EPA MAY ISSUE REVISED OZONE NAAQS, DESIGNATE AREAS AS NONATTAINMENT UNDER THE REVISED NAAQS, AND IMPLEMENT THE REVISED NAAQS

A. Respondents Improperly Seek to Enlarge the Judgment They Obtained Below by Asking This Court to Vacate the Revised Ozone NAAQS

The court of appeals held that EPA was permitted to revise the ozone NAAQS and required to designate areas as nonattainment under any revised NAAQS. U.S. Pet. App. 361. However, the court also held that the agency could implement the revised NAAQS only in conformity with the classifications, attainment dates, and control measures set forth in Subpart 2 of Part D of the Clean Air Act, 42 U.S.C. 7511-7511f. US Pet. App. 34a. The court decided not to vacate the revised standard because EPA had authority to issue it and because the standard was "unlikely to engender costly compliance activities" by virtue of the court's ruling limiting implementation. U.S. Pet. App. 57a.

Respondents Appalachian Power, *et al.*, and Ohio, *et al.*, now seek to enlarge the judgment they obtained in the court of appeals by asking this Court to vacate the revised ozone standard on the ground that EPA had no authority to revise the prior ozone standard. APC Br. 2, 50; Ohio Br. 10, 40; *cf.*

ATA Br. 39 (conditionally embracing Ohio's argument). Respondents Ohio *et al.* are mistaken in asserting that their request for vacatur of the ozone standard would lead this Court to "affirm the lower court judgment," Ohio Br. 12 n. 1, because, as noted, the lower court chose not to vacate the ozone standard. U.S. Pet. App. 57a.

"A cross-petition is required ... when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *see also, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119, n. 14 (1985). This Court has refused to consider arguments that, if accepted, would require modification of the judgment below in the absence of a petition for certiorari raising such issues. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560, n. 11 (1976). Having found that EPA was authorized to issue a revised ozone standard, the court of appeals deliberately chose *not* to vacate that standard. Respondents cannot now ask this Court to hold that EPA may not revise the ozone standard, and to vacate the revised standard, when they did not petition for certiorari on this point.[9]

B. The Clean Air Act Permits EPA to Revise the Ozone Standard that Existed in 1990

If this Court decides, despite the absence of a petition for certiorari on this issue, to reach the question whether the court of appeals was correct in holding that EPA had no authority

---

[9]The cross-petitions in No. 99-1426, challenging EPA's longstanding interpretation of section 109 of the Clean Air Act, do not justify respondents' *independent* efforts to alter the judgment below on the basis of Subpart 2. If this Court were to uphold EPA's interpretation of section 109 of the Clean Air Act, then there would remain no properly presented argument that the Court should vacate EPA's revised NAAQS. Indeed, ATA *et al.*, stated that their cross-petition "would not change the *form of the judgment*." ATA Cross-Pet. 28.

even to revise the ozone standard, it should hold that EPA has such authority.

The Clean Air Act imposes on EPA an obligation periodically to review and to revise the air quality criteria and NAAQS. Section 109(d)(1) of the Act provides:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator *shall* complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and *shall make such revisions in such criteria and standards* and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.

42 U.S.C. 7409(d)(1) (emphasis added). Under this section, EPA is clearly obligated to conduct a periodic review of the criteria and NAAQS, and to revise them if appropriate in light of the requirements of sections 108 and 109(b) of the Act.

Nothing in the statute erases EPA's obligation to review and revise the criteria and standards for all criteria pollutants, including ozone. The 1990 amendments, which added Subpart 2's specific requirements for implementing the ozone NAAQS that existed in 1990, did not alter section 109(d)(1) of the Act. Indeed, the 1990 amendments specifically contemplated that the NAAQS might be revised. Section 172(e) provides:

> If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. 7502(e). By its terms, section 7502(e) applies to all of the primary NAAQS, including the ozone NAAQS. Despite the court of appeals' express reliance on section 172(e) in holding that EPA may revise the ozone standard, U.S. Pet.

App. 35a, respondents do not even *mention* section 172(e) in their briefs.[10]

Respondents' argument not only flouts the clear language of the Act, it also would produce unreasonable consequences. Not even respondents argue that subpart 2 silently eliminates EPA's obligation to review and revise the air quality *criteria* for the ozone NAAQS, nor could they, given that in order to effect the relaxation of standards contemplated by section 172(e), new criteria documents would be required. Thus, under respondents' view, EPA must update the criteria documents for ozone to reflect the latest scientific information on ozone's adverse effects on human health and welfare, but if that information shows that ozone is more harmful than EPA had previously believed it to be, it has no power to change the regulatory regime to reflect that new information. Requiring the enormous expenditure of time and resources that goes into developing criteria documents, all to no purpose if the documents showed greater health effects than had previously

[10]Instead, respondents Ohio, *et al.*, discuss a provision of a House bill that was not enacted. That provision set a schedule for developing control requirements for a revised ozone NAAQS. Ohio Br. 15, citing H.R. 2323, 101st Cong., Section 181(e) (1989), as introduced, reprinted in II 1990 Leg. Hist. at 4060. Respondents do not mention that the cited provision stated that requirements pertaining to any revised ozone NAAQS "shall provide for controls which are not less stringent than the controls applicable to areas classified under this subpart." *Id.* Nor do they note that the House bill included this identical provision with respect to the other two pollutants discussed in that bill, carbon monoxide (*id.* at 4079) and particulate matter (*id.* at 4090). These provisions were clearly the precursors to section 172(e) of the enacted statute. Respondents' selective citations to the unenacted House bill, and their complete neglect of the parallel provision of the enacted statute, convey a wholly misleading impression of Congress's actions.

been predicted, would make no sense.[11]

Moreover, respondents' argument that Subpart 2 silently codifies the ozone standard existing in 1990 ignores the fact that the classifications and attainment dates set forth in Subpart 2 apply only to the *primary* ozone standard, not to the secondary standard. 42 U.S.C. 7511(a)(1) (Table 1). Respondents make a weak attempt to suggest that the secondary standard should be covered by Subpart 2, too, because section 181(a)(1) refers to "ozone nonattainment areas" generally. This argument ignores section 181(a)(1)'s explicit and exclusive reference to "*primary* standard attainment dates." 42 U.S.C. 7511(a)(1). Section 181(a)(1) thus clearly does not codify the secondary ozone standard existing in 1990. It would be very awkward to conclude that Congress had left EPA free only to change the secondary, but not the primary, ozone NAAQS.

Respondents offer two textual arguments in support of their claim that EPA may not revise the ozone NAAQS that existed in 1990. First, they argue that revision of the ozone NAAQS is not "appropriate" within the meaning of section 109(d)(1) because such a standard cannot be implemented except within the confines of Subpart 2. APC Br. 49; ATA Br. 39. As the court of appeals held, however, this argument "pointedly ignores the text immediately following the word 'appropriate,' which specifies that appropriateness is to be determined 'in accordance with section 7408 ... and [section 7409(b)] ...'" U.S. Pet. App. 35a-36a. The court of appeals correctly concluded

[11]ATA, *et al.*, suggest that EPA could share its information with Congress. ATA Br. 39-40. But that is not the regime created by section 109(b) of the Act, which clearly requires *EPA* to act upon the information developed in the criteria documents. 42 U.S.C. 7409(b). In many other sections of the Act, Congress required EPA to report to it on various matters, which would then be handled by Congress itself (*see* 42 U.S.C. 7548, 7511f, 7491-92, 7612); section 109(b) does not establish such a reporting scheme.

that Subpart 2 could not render revision of the ozone NAAQS inappropriate where Subpart 2 was neither listed in section 109(d)(1) nor incorporated by reference through section 108 or 109(b). U.S. Pet. App. 36a. Here, too, respondents simply ignore statutory language that runs counter to their preferred interpretation of the statute.

Second, respondents argue that it would make no sense to have a NAAQS that could not be implemented. Because, they contend, Subpart 2 precludes the implementation of any revised ozone NAAQS, this must mean that EPA may not revise the ozone NAAQS in the first place. APC Br. 42-47; Ohio Br. 13-16; ATA Br. 39. We agree that it makes no sense to have a standard that cannot be implemented. But we draw the opposite inference from this premise: because the Clean Air Act clearly obligates EPA to review and revise the air quality criteria and standards where appropriate in light of changing scientific knowledge, 42 U.S.C. 7408, 7409, EPA must be able to implement the standards it has deemed requisite to protect the public health and welfare.

C. Subpart 2 of the Clean Air Act Does Not Constrain EPA's Authority to Implement the Revised Ozone NAAQS

In our opening brief in this case, we canvassed the reasons for concluding, based on the language, history, and purpose of the statutory provisions, that Subpart 2 does not prevent EPA from implementing the revised ozone standard. Mass. & NJ Br., No. 99-1257, at 43-50. Respondents Ohio, *et al.*, and Appalachian Power, *et al.*, effectively concede that the court of appeals' ruling that EPA may revise the ozone standard, but may not implement the revised standard, makes no sense. Ohio Br. 24. The implication they draw from this insight–that EPA may not even revise the standard–is, as we have explained, inconsistent with the text of the statute itself.

For its part, ATA continues to argue that EPA may issue but

not implement a revised ozone standard. ATA Br. 39. It rests this argument on an untenable claim: contrary to the court of appeals' decision, ATA argues that EPA may not designate areas as nonattainment under a revised ozone standard. ATA Br. 39. ATA must recognize that its argument that the revised ozone standard may be implemented only in conformity with Subpart 2 would make no sense if EPA were under an obligation to designate areas as nonattainment under the revised ozone NAAQS. Section 181(a)(1) makes the classifications it specifies turn on the "interpretation methodology" of the *prior* ozone standard. 42 U.S.C. 7511(a)(1). Thus it is not possible to classify nonattainment areas under the *revised* ozone standard under section 181(a)(1). Mass. & NJ Br., No. 99-1257, at 46-48. Implicitly acknowledging that it would be absurd to require EPA to designate areas and then to ignore those same designations in promulgating classifications, respondents argue that EPA may not even designate areas as nonattainment under the revised ozone standard. ATA Br. 39. This argument flies in the face of the statutory language.

In 1990, at the same time as it was refining the requirements for implementing the then-existing NAAQS, Congress amended section 107(d)(1) of the Act to read as follows:

> By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new *or revised* national ambient air quality standard *for any pollutant* under section 7409 of this title, the Governor of each State shall ... submit to the Administrator a list of all areas (or portions therefore) in the State, designating [areas] as ... nonattainment, ... attainment, ... or unclassifiable ...

42 U.S.C. 7407(d)(1)(A) (emphasis added). Section 107(d)(1) goes on to require the Administrator to

> promulgate the designations of *all areas* ... submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard.

42 U.S.C. 7407(d)(1)(B)(i) (emphasis added).

Once again, these provisions do not carve out any exception for the ozone standard; they apply equally to all revised NAAQS. Indeed, in legislation specifically aimed at EPA's revised ozone standard, Congress extended the states' deadline for designations to two years and shortened EPA's deadline to one year. *See* Transportation Equity Act for the 21st Century, Pub. L. 105-178, §6103, 112 Stat. 107, 465. This statute reinforces the conclusion that EPA may (indeed, must) designate areas under the revised ozone standard.

Implicitly recognizing that EPA is under an obligation to promulgate *some* designation pursuant to section 107(d)(1), respondents recommend that EPA designate all areas as "unclassifiable." ATA Br. 39. But such a designation is permissible only where it is not possible "on the basis of available information" to say whether an area "meet[s] or [does] not meet[] the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. 7407(d)(1)(A)(iii). No one argues that it is not possible to say whether an area's air quality meets the revised NAAQS for ozone, and thus respondents' suggestion is misguided. Perhaps recognizing the weakness of their claim, respondents ATA, *et al.*, quickly fall back on the argument embraced by the other respondents: EPA may not revise the ozone standard. ATA Br. at 39. For the reasons stated in the preceding section, this argument is mistaken.

CONCLUSION

This Court should reverse the court of appeals' ruling that the Clean Air Act and EPA's longstanding interpretation of it violate the nondelegation doctrine. The Court should affirm the lower court's ruling that EPA may revise the NAAQS for ozone and designate nonattainment areas under that NAAQS, but it should reverse the court's decision that EPA may not implement the revised standard outside Subpart 2 of the Act.

Respectfully submitted.

JOHN J. FARMER
Attorney General
State of New Jersey

HOWARD L. GEDULDIG
JOHN R. RENELLA
Deputy Attys. Gen., N.J.
Richard J. Hughes Justice Complex, 7th floor
P.O. Box 093
Trenton, NJ 08625

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

EDWARD G. BOHLEN
Assistant Atty. General, Mass.
200 Portland Street
Boston, MA 02114

LISA HEINZERLING
Counsel of Record
Special Asst. Atty. Gen., Mass.
Special Counsel, N.J.
Georgetown Univ. Law Center
600 New Jersey Ave. N.W.
Washington, DC 20001
(202) 662-9115

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

[redacted]

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

NO. 99-1257

IN THE
SUPREME COURT OF THE UNITED STATES

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL

Petitioners,

v.

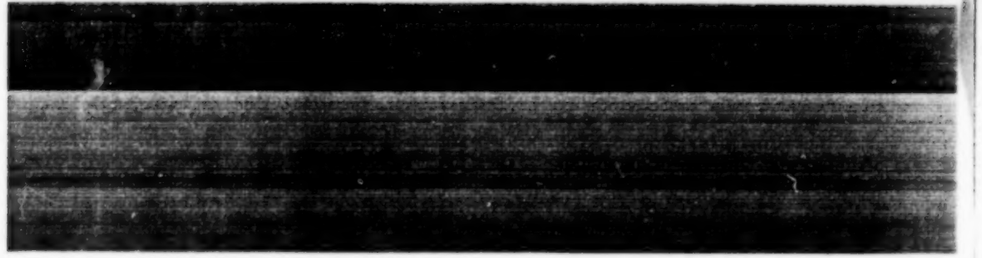
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the District of Columbia

BRIEF OF *AMICUS CURIAE* OF ALCAN ALUMINUM CORPORATION IN SUPPORT OF RESPONDENTS

Lawrence A. Salibra, II
Elisa P. Pizzino
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights, Ohio 44124-4185
(440) 423-6918



QUESTIONS PRESENTED

Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors "other that health effects relating to pollutants in the air," given that consideration of such factors would permit both Agency and reviewing courts to avoid confronting constitutional non-delegation issues.

INTEREST OF THE AMICUS CURIAE[1]

Amicus Curiae, Alcan Aluminum Corporation ("Alcan") is a subsidiary of Alcan Aluminum Limited, a Canadian Corporation. Alcan is engaged in the business of aluminum smelting and fabrication. It has major manufacturing facilities in the United States, which are subject to regulation by the Environmental Protection Agency as well as other federal agencies. It employs 4500 men and women and operates facilities in 13 States. Because of the substantial investment in operations in the United States, Alcan has a direct interest in insuring that the regulatory activities by federal agencies are predicted on a reliable basis to insure that the actions which Congress sought to achieve are in fact attained and that the regulated are not subjected to unnecessary costs which do not achieve the intended benefit.

SUMMARY OF ARGUMENT

Alcan believes that the manner in which present constitutional issue is framed by the lower court, presents an inescapable implication in the position of the United States Environmental Protection Agency ("EPA") that it is not required to, and in fact has not complied, with the reliability requirement for the promulgation of standards.

By taking the position that it is not obligated by the Clean Air Act to undertake a cost-benefit analysis, the EPA has implicitly conceded that it does not have the substantiation and has not undertaken the appropriate effort in the rulemaking process to comply with the reliability requirements of 42 USC §7607. This shortcoming is a two-prong failure. First, to properly evaluate

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief. Consent letters for all parties have been filed with this brief.

benefits, one must necessarily evaluate costs. Among the costs to be considered are not merely the costs of implementing the standards in terms of absolute dollars to the regulated, but the consequences of the standard's impact from a comprehensive standpoint to insure it does not result in changes of behavior of the regulated and the public such that any presumed reduction of risk from the standard is either negated or overall risk is enhanced.

The second part of the reliability requirement is to ensure that conclusions concerning risk associated with various limits on air standards complies with the requirements that this Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Before this Court resolves the constitutional issue presented unnecessarily, we urge this Court to consider a remand of this case for comprehensive review of the record to insure that the regulations at issue meet these reliability requirement.

ARGUMENT

I. A FEDERAL COURT SHOULD NOT RESOLVE A DISPUTE BY REACHING A CONSTITUTIONAL ISSUE WHEN THE CASE MAY BE RESOLVED ON ALTERNATIVE GROUNDS.

It is a well embedded principle that federal courts should not reach a constitutional issue if there is a non-constitutional ground for deciding the case. *See Gulf Oil Co. v. Bernard* 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Burton v. U.S.*, 196 U.S. 283,295 (1905); *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936).

II. THE STATUTORY SCHEME CLEARLY REQUIRES THE EPA TO CONSIDER CONSEQUENTIAL COSTS OF THE PROMULGATION OF AIR QUALITY CRITERIA.

The EPA paraphrases its obligation under the Clean Air Act to use "the latest scientific knowledge" to develop air quality criteria

based on "all identifiable effects on public health or welfare." Petitioners Brief at 4. The EPA has apparently interpreted 42 U.S.C. 7408 to limit its consideration exclusively to the impact of the pollutant alone on health. The present dispute before this Court arises because the EPA has taken the position that the statute does not permit it to consider economic impact, feasibility or significance of the risk. However, the EPA's statutory obligation to evaluate "all identifiable effects on public health or welfare" is more comprehensive than the simple dose-response analysis conducted by the EPA.

The statute further defines what it means by "all identifiable effects" to include "those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant." 42 U.S.C. 7408 (a) (2) (A). This broad requirement imposes on the EPA the obligation to evaluate the totality of the consequences of its proposed regulatory efforts. Even if the EPA is correct that it is not obligated to consider the economic impact on the regulated entity as a factor in itself, to the extent that such impact translates into adverse impact on public health or welfare, such as making needed energy for heating, cooling or transportation practically unavailable to certain groups such a requirement is mandated.

It appears clear that the EPA has developed no reliable data to address this requirement. In fact, it does not even appear to have reliable data to demonstrate the likely consequences of the approach it has chosen on the simple dose-response issue as contrasted with the other alternative options available. Thus concludes Professor Cass R. Sunstein[2] who studied the record in depth that the final rules at issue are not accompanied by any quantification of the risks associated with competing standards. Nor is there an explanation of

---

[2] Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. LAW REV. 303, 328 (1999).

the basic value judgment showing what level of risk was chosen and why they are requisite to protect public health.

This Court should remand this case with instructions to the EPA to develop the record as required by 42 U.S.C. 7408 (a) (2) (A).

III. IT DOES NOT APPEAR THAT THE BASIS ON WHICH THE EPA PROMULGATED THE CHALLENGED REGULATIONS IS BASED ON RELIABLE EVIDENCE AS REQUIRED BY *DAUBERT*.

This case is an appropriate case for this Court to confirm that the *Daubert* standard which established the standard for "reliability" for expert testimony in federal court is also applicable to agency rule making. *Daubert* and its progeny "'establishes a standard of evidentiary *reliability*.'"[3] Commentators have recognized the logical relationship between the reliability standard for admissibility and the same requirement for federal agency action:

> ...The APA has express language that directly supports the application of the Supreme Court's *Daubert* Four. APA section 556(d) states that "sanction may not be imposed or rule or order issued except [when] *supported by* and in accordance with *reliable*, probative and substantial evidence."[4]

The Federal Appellate Courts have recognized that any deference to an agency is based on its status as an expert and as such its

[3] *Kumho Tire Co. v. Carmichael*, 118 S.Ct. 1167, 1175 (quoting *Daubert*, 125 L. Ed. 2d. at 482). (emphasis added).

[4] Charles D. Weller and David B. Graham, *New Approaches To Environmental Law and Agency Regulation: The Daubert Litigation Standard*, 30 ELR 10557, 10568 (2000). The authors argue that there is no plausible reason why *Daubert* should not be applied to all agency adjudication or rule making., at 10569. In fact courts have already imported *Daubert* into agency rule making. *See: Tabas v. Food Lion Inc.*, 171 F.3d 308 (5th Cir. 1998).

position must comport with expert behavior. *See Chicago Board of Trade v. SEC*, 187 F.3d 713 (7th Cir. 1999) (stressing that agency must act like an expert to receive deference) and *Rechtel v. FCC*, 10 Fed 3rd 875 (D.C. Cir. 1993) (agency action set aside when it failed to undertake the empirical analysis to support factual propositions).

Since the EPA did not attempt to quantify the risks, it is virtually impossible to determine why the agency chose the standards it adopted. Without specification of the range of benefits attainable from various approaches, "there is a weak role for sound science in standard setting".[5] It is impossible to evaluate the reliability of the agency rulemaking because it is impossible to discern the basis for the EPA judgments.

CONCLUSION

For the foregoing reasons, Alcan believes that the EPA has not established that its standards are rooted in sufficiently reliable evidence. Accordingly, the Court should vacate the EPA ozone and particulate standards on this basis and remand this case with instructions to the EPA to promulgate new standards based on the reliability standard articulated in *Daubert*.

Respectfully submitted.

Lawrence A. Salibra, II
Alcan Aluminum Corporation
6060 Parkland Blvd
Mayfield Heights, Ohio 44124
(440) 423-6918
Attorneys for Amicus Curiae
Alcan Aluminum Corporation

[5] Sunstein *supra*., at p. 363